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New York (State) Reports

CIVIL
PROCEDURE REPORTS.
CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE
AND
THE GENERAL CIVIL PRACTICE
OF THE
STATE OF NEW YORK.

REPORTED WITH NOTES
BY
HENRY H. BROWNE
OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PRO-
CEDURE CONSTRUED OR CITED IN THE OPINIONS CONTAINED IN
THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COV-
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CONTENTS.

Sections of the Code of Civil Procedure. }	Page
8, 11, 14 <i>In re JONES</i>	250
Contempts punishable civilly; form of Warrant.	
14 STEPHENSON <i>v.</i> HANSON.....	43
Where surety to undertaking guilty of contempt; punishment.	
55 GEARON <i>v.</i> BANK FOR SAVINGS.....	207
Party to action when not liable for false arrest directed by his attorney.	
341 HEENAN <i>v.</i> N. Y., W. S. & B. R. R. Co.....	348
County courts; jurisdiction of, of actions against domestic corporations.	
382 KNAPP <i>v.</i> SIMON.....	1
Statute of limitations; application of, to broker's contract.	
388 ESTATE OF STAGG, deceased.....	88
Surrogate's court; limitations to proceedings for accounting.	
388, 396 ESTATE OF COLLINS, deceased.....	85
Same subject.	
401 ENGLE <i>v.</i> FISCHER.....	307
Limitations of Actions; coming into state; con- cealment in state.	
419 SWEET <i>v.</i> SANDERSON BROTHERS STEEL Co.....	69
Complaint; effect of service of, after service of summons and before appearance of defendant.	
421 COLE <i>v.</i> MCGARVEY.....	305
Special appearance; discontinuing action after.	
422 SWEET <i>v.</i> SANDERSON BROTHERS STEEL Co.....	69
Complaint; service of; time to answer.	
424 PHELPS <i>v.</i> PHELPS.....	117
Appearance; what amounts to.	
435, 436, 437 SMITH <i>v.</i> FOGARTY.....	366
Substituted service of summons; affidavit; time to answer.	

Sections of the Code of Civil Procedure. }		Page
438, 439	SYRACUSE SAVINGS BANK <i>v.</i> BURTON.....	216
	Summons; service by publication on infant; questioning regularity.	
439	PHELPS <i>v.</i> PHELPS.....	117
	Service by publication; certificate to affidavit taken without the state.	
447	KEELER <i>v.</i> MCNEIRNEY.....	363
	Parties to action to foreclose mortgage.	
449	VIADERO <i>v.</i> MORTON	238
	Auctioneer's bond; action on, by whom brought.	
450	LAUDE <i>v.</i> SMITH.....	51
	Parties to action against married woman for slander.	
450	MUSER <i>v.</i> LEWIS.....	135
	Liability of husband for wife's torts.	
454	VIADERO <i>v.</i> MORTON	238
	Parties to action; when all the obligors in bond not necessary.	
472	COLE <i>v.</i> MCGARVEY.....	305
	Guardian <i>ad litem</i> ; acknowledgment of consent to be.	
479	SWEET <i>v.</i> SANDERSON BROTHERS STEEL Co.....	69
	Complaint; when to be served.	
481	SPRAGUE <i>v.</i> PARSONS....	26
	Pleading in action on undertaking on attachment.	
484	DE SILVER <i>v.</i> HOLDEN	121
	Joinder of causes of action for false representa- tion and conversion.	
488, 499	HEENAN <i>v.</i> N. Y., W. S. & B. R. R. Co	348
	Jurisdiction; objection to want of, how raised.	
500	HENDERSON <i>v.</i> SCOTT.....	39
	Pleadings; former recovery when to be pleaded.	
500	LIDGERWOOD M'F'G Co. <i>v.</i> BAIRD	54
	Pleadings; denial in answer on information and belief.	
500, 501	BARNES <i>v.</i> GILMORE.....	286
	Counterclaim; when sufficient.	
523, 529	FRIST <i>v.</i> CLIMM	30
	When verification of answer may be omitted.	
524	LIDGERWOOD M'F'G Co. <i>v.</i> BAIRD.....	54
	Denials in answer may be on information and belief.	
528	PHELPS <i>v.</i> PHELPS.....	117
	Verification of pleading; defective.	

CONTENTS.

v

Sections of the Code of Civil Procedure. }		Page
529	FRIST v. CLIMM.....	30
	Verification of answer; omitting.	
531	SNIFFEN v. PECK.....	188
	Stay of proceedings in order for bill of particulars does not extend time to answer; vacating.	
531	ORDEN GERMANIA v. DEVENDER.....	161
	Bill of particulars; when required in action for money misappropriated by officer of society or through his negligence.	
531	HAYES v. DAVIDSON.....	330
	Bill of particulars; when ordered in action by assignee against sheriff for conversion.	
521	FEELY v. MANHATTAN RY Co.....	414
	Bill of particulars; when required of answer alleg- ing waiver and laches as defense.	
539-541	KNAPP v. SIMON.....	1
	Pleadings; when court will give party benefit of cause of action established by evidence notwith- standing insufficiency of pleadings.	
549 subd. 1	KAUFMAN v. LINDNER.....	148
	Fraud; what amounts to, in contracting liability; necessity of pleading.	
549	STRAUS v. KREIS.....	77
	Order of arrest; when complaint or affidavit stating its contents to be presented on applica- tion for.	
549, 550	STERN v. MOSS.....	184
	Execution against the person when issued out of District Court in the City of New York.	
550	ROSS v. WIGG.....	263
	Order of arrest; when not vacated when <i>prima</i> <i>facie</i> case made out.	
550	Ross v. Wigg (note).....	268
	Same subject.	
602 et seq.	PHOENIX FOUNDRY AND MACHINE Co. v. NORTH RIVER CONST. Co.	106
	Order staying proceedings; when not void; insuffi- cient service of.	
603 et seq.	REIS v. RHODE.....	406
	Injunction; power of court to grant restraining interference with acting trustee of religious cor- poration by rival claimant of the office.	
635	REMINGTON PATER Co. v. O'DOUGHERTY.....	79

Sections of the Code of Civil Procedure. }		Page
	Attachment; when will not lie; judgment or statutory liability not contract.	
635 et seq.	McBLAINE v. SPEELMAN.....	401
	Attachment; questioning validity of in collateral action.	
636	SMITH v. FOGARTY.....	366
	Attachment; when affidavit on which, granted insufficient.	
636	ROSS v. WIGG.....	263
	Attachment; vacation of, when <i>prima facie</i> case made out.	
636	ROSS v. Wigg (note).....	263
	Same subject.	
640	SERAQUE v. PARSONS.....	26
	Attachment; action for damages resulting from, void or irregular.	
648, 649	ANTHONY v. WOOD.....	164
	Attachment; levying on promissory note, etc.; prior fraudulent transfer.	
682	McBLAINE v. SPEELMAN.....	401
	Attachment; when validity cannot be questioned in collateral action.	
719	ROSS v. WIGG.....	263
	When one of two provisional remedies granted at the same time vacated.	
719	ROSS v. Wigg (note)....	268
	Same subject.	
723	PEOPLE <i>ex rel.</i> HERKIMER AND MOHAWK R. R. Co. v. ASSESSORS OF THE TOWN OF HERKIMER.....	297
	Certiorari; amendment of.	
755-757	DOCK v. SOUTH BROOKLYN SAW MILL Co.....	144
	Revival and continuance of action in case of death of plaintiff; assignee of executor; counter- claim.	
769	U. S. TRUST Co. v. N. Y., W. S. & B. R. R. Co. . .	90
	Receiver of corporation; motion for appointment of, where made.	
769	PHENIX FOUNDRY AND MACHINE Co. v. NORTH RIVER CONST. Co.....	106
	Motion to vacate injunction order where made.	
776	APSLEY v. WOOD.....	178
	Renewal of motion; what amounts to new proof on.	
781, 783	SNIFFEN v. PECK.....	183

CONTENTS.

vii

Sections of the Code of Civil Procedure. }		Page
	Stay of proceedings; not extension of time to answer.	
803 et seq.	MEHESEY v. KAHN.....	33
	Order for inspection of books when granted.	
811	MCGEAN v. MACKELLAR.....	169
	Undertakings; guarantee of, by corporation; justification.	
811	Earle v. Earle (note).....	171
	Same subject.	
812	STEPHENSON v. HANSON.....	43
	Undertaking on order of arrest; effect of appeal from judgment in action in which it was given on liability under.	
827	APSLEY v. WOOD.....	178
	When report of referee to take proof on motion should stand.	
828, 829	WILSON v. MUNOZ.....	71
	Evidence in action against administrator; what proof of interest necessary to exclude witness.	
828, 829	ESTATE of LE BARON.....	62
	Evidence; to exclude testimony, in surrogate's court on ground of interest must be objected to by executor, administrator or survivor; objection by creditor insufficient.	
829	TAYLOR v. MELDRUM.....	235
	Evidence of personal transaction between party and deceased person through whom both parties claim.	
837	DAVENPORT GLUCOSE Co. v. TAUSSIG.....	152
	Examination of party before trial; questions tending to criminate witness.	
844	ROSS v. WIGG.....	263
	Affidavit taken without state; who authorized to take; form of certificate to.	
844	Ross v. Wigg (note).....	268
	Same subject.	
844	PHELPS v. PHELPS.....	117
	Certificate to affidavit taken without the State.	
854-857	In re JONES.....	250
	Contempt of witness in not answering proper interrogatories, how punished.	
867-869	PRUDEN v. TALLMAN.....	360
	Supplementary proceedings; mode of compelling production of books on examination in.	

Sections of the Code of Civil Procedure. }		Page
867-869	<i>Holmes, Booth & Hayden v. Steitz (note)</i>	362
	Same subject.	
870	DAVENPORT GLUCOSE CO. v. TAUSSIG.....	152
	Examination before trial; in action to recover chattels, sale of which was procured by fraud; of assignee for benefit of creditors.	
970-972	LEARNED v. TILLOTSON.....	425
	Verdict of jury on specific questions of fact in ac- tion triable by court; power of court to disregard.	
977	HABERSTICH v. FISCHER.....	82
	Notice of trial; what amounts to waiver of.	
993	GOETTLING v. BIEHLER.....	324
	Findings; effect of failure to make, because deemed unnecessary.	
997	<i>In re</i> N. Y., WEST SHORE AND BUFFALO R. R. Co TO ACQUIRE LANDS OF JUDSON ..	302
	Appeal; report of commissioners in proceedings to acquire land for railroad, how corrected.	
1003	LEARNED v. TILLOTSON.....	425
	Verdict of jury on specific questions of fact; effect of.	
1013	ADAMS v. CITY OF UTICA.....	294
	Compulsory reference; when ordered in action by attorney for services; proof of value of such ser- vices.	
1019	LITTLE v. LYNCH.....	418
	Referee's report; what is sufficient delivery of.	
1023	GOETTLING v. BIEHLER.....	324
	Findings; how disposed of by court before which action tried.	
1206	LAUDE v. SMITH.....	51
	Husband not proper party to action against wife for slander.	
1207	JENKS v. VAN BRUNT.....	158
	Power to amend complaint on appeal.	
1216	SMITH v. FOGARTY.....	366
	Proof on entry of judgment on substituted service.	
1260	WOODFORD v. RASBACK.....	315
	WOODFORD v. CHAPMAN.....	315
	Satisfaction of judgment by attorney; cannot be on partial payment thereof.	
1269	KAUFMAN v. LINDNER.....	142
	Bankruptcy; discharging judgment of record where debtor discharged in.	

CONTENTS.

ix

Sections of the Code of Civil Procedure. }		Page
1316	DE SILVER <i>v.</i> HOLDEN.....	121
	Appeal from final judgment overruling demurrer brings up order for review.	
1326	McGEAN <i>v.</i> MACKELLAR.....	169
	Corporate guarantee of undertaking on appeal.	
1326	Earle <i>v.</i> Earle. (note).....	171
	Same subject.	
1326 <i>et seq.</i>	HURD <i>v.</i> HANNIBAL & ST. JOSEPH R. R. Co	386
	Same subject ; form of undertaking ; justification.	
1328, 1329, } 1335 }	GOODWIN <i>v.</i> BUNZL.....	226
	Undertaking on appeal ; when sureties on defect- ive, liable.	
1337	LEARNED <i>v.</i> TILLOTSON.....	425
	Appeal ; reviewing facts on, in court of appeals.	
1342	LIPPINCOTT <i>v.</i> WESTRAY.....	74
	What brought up for review by appeal from order denying application for resettlement of order.	
1352	WHITE <i>v.</i> RINTOUL	259
	Undertaking on appeal ; form of, when guaran- teed by corporation.	
1366	ANSONIA BRASS AND COPPER Co. <i>v.</i> CONNER.....	173
	Time of sheriff to return execution extended by stay of proceedings.	
1421-1425	HAYES <i>v.</i> DAVIDSON.....	377
	Substitution of indemnitors for, in action against, for wrongfully taking, etc., personal property ; liability of indemnitors ; waiver of objection.	
1498	KEELER <i>v.</i> McNEIRNEY	363
	Foreclosure of mortgage ; questions which cannot be tried in action for.	
1498	KENT <i>v.</i> POPHAM.....	336
	Same subject. Proper parties to action for fore- closure.	
1515, 1531	HENDERSON <i>v.</i> SCOTT	89
	Ejectment ; damages on recovery of real property in ; ouster.	
1632	KENT <i>v.</i> POPHAM	386
	Foreclosure ; effect of sale in, on title of persons claiming adversely to mortgagor and mortgagee.	
1695, 1699	IRR <i>v.</i> SCHROEDER.....	253
	Effect of error in replevin on judgment in jus- tice's court.	
1809, 1810	PHOENIX FOUNDRY AND MACHINE Co. <i>v.</i> NORTH RIVER CONST. Co.....	106

Sections of the Code of Civil Procedure. }		Page
	Receiver; power of Supreme Court to appoint, of insolvent foreign corporation.	
1809, 1810	WOERISHOFFER <i>v.</i> NORTH RIVER CONSTRUCTION Co.	113
	Same subject; notice to attorney general.	
1810	U. S. TRUST Co. <i>v.</i> N. Y., W. S. & B. R. R. Co..	90
	Appointment of receiver of domestic corporation; where made.	
1810	<i>In re</i> E. M. BOYNTON SAW AND FILE Co.....	342
	Voluntary dissolution of corporation; appointment of receiver; when may be made.	
1819	ESTATE OF COLLINS, deceased.....	85
	Limitations to proceeding to compel executor to account.	
1902, 1903	THOMAS <i>v.</i> UTICA & BLACK R. R. R. Co.....	353
	Action for causing death; measure of damages.	
1904	BOYD <i>v.</i> N. Y. C. & H. R. R. R. Co.....	222
	What is "recovery" in action for causing death.	
1948 <i>et seq.</i>	REIS <i>v.</i> RHODE.....	406
	Religious corporation; determination of title of rival claimants to trusteeship of, cannot be made in equitable action brought by one claimant.	
1991, 1992	PEOPLE <i>ex rel.</i> HERKIMER AND MOHAWK R. R. Co. <i>v.</i> ASSESSORS OF THE TOWN OF HERKIMER....	297
	Certiorari; effect of omission of seal.	
2015 <i>et seq.</i> , }	PEOPLE <i>ex rel.</i> HOYLE <i>v.</i> OSBORNE.....	299
2019	<i>Habeas Corpus</i> to secure custody of child; by whom issued.	
2129	PEOPLE <i>ex rel.</i> HERKIMER AND MOHAWK R. R. Co. <i>v.</i> ASSESSORS OF THE TOWN OF HERKIMER.....	297
	Certiorari; assessors of town to be designated in, by individual names.	
2285	<i>In re</i> JONES.....	250
	Contempt; punishment for.	
2419 <i>et seq.</i>	<i>In re</i> E. M. BOYNTON SAW AND FILE Co....	342
	Voluntary dissolution of corporation; contents of report of referee, or decision of court on.	
2432 <i>et seq.</i>	PRUDEN <i>v.</i> TALLMAN.....	360
	Production of books; supplementary proceedings.	
2432, <i>et seq.</i>	Holmes, Booth & Hayden <i>v.</i> Stietz (note).....	362
	Same subject.	
2433	LIPPINCOTT <i>v.</i> WESTRAY.....	74
	Supplementary proceedings; order appointing receiver, by whom made.	
2435, 2436	SELIGMAN <i>v.</i> WALLACH.....	232

CONTENTS.

xi

Sections of the Code of Civil Procedure. }		Page
	Supplementary proceedings; extent of examination in, when debtor has made assignment for benefit of creditors.	
2444	<i>Holmes, Booth & Hayden v. Stietz (note)</i>	362
	Supplementary proceedings; production of books.	
2464	STROHN v. EPSTEIN.....	36
	Supplementary proceedings; receiver; notice of application for.	
2464	DE VIVIER v. SMITH.....	394
	Supplementary proceedings; appointment of receiver.	
	NOTE ON APPOINTMENT OF RECEIVER IN SUPPLEMENTARY PROCEEDINGS.....	396
2481 subd. 6	ESTATE OF SINGER, deceased.....	389
	Accounting of executor, trustee and guardian; opening decree.	
2481 subd. 7	<i>In re JONES</i>	250
	Power of surrogate to punish for contempt.	
2481 subd. 6	ESTATE OF TILDEN, deceased..	15
2527	Surrogate's court; power of surrogate and of supreme court to open, vacate and set aside accounting of executors; effect of irregular service of citations; appointment of guardian <i>ad litem</i> .	
2611	ESTATE OF BOGERT, deceased.....	128
	Probate of will; proof on.	
2615	<i>In re POWERS</i> , deceased.....	326
	Probate of will; when aliens should be cited to attend.	
2618, 2623	ESTATE OF BOGERT, deceased.....	128
	Will; when properly admitted to probate against testimony of subscribing witness.	
2723	ESTATE OF COLLINS, deceased.....	85
	Proceedings for accounting of executor; limitations.	
2723	ESTATE OF STAGG, deceased.....	88
	Same subject.	
2743	ESTATE OF YORK, deceased.....	245
	Jurisdiction of surrogate to determine rights of legatees.	
2750	ESTATE OF LE BARON, deceased.....	62
	Surrogate's court; sale of property to pay debts.	
2876	IRR v. SCHROEDER.....	258
	Justice of the peace; provisional remedies in courts of.	

Sections of the Code of Civil Procedure. }		Page
2894-2904	STERN v. MOSS.....	184
	Arrest in N. Y. District Court.	
2901, 2902, 2916, 2917, 2926, 2925, .2933	IRR v. SCHROEDER.....	253
	Justice of the peace; provisional remedies in courts of.	
2966	LIVINGSTON v. MORRISSEY.....	28
	Justice's court; depositions taken on adjourn ing case.	
3002	<i>In re</i> JONES.....	250
	Contempt; contents of warrant of commitment.	
3016	ALLEN v. SWAN.....	56
	Justice's court; when offer to reduce verdict may be made; power of justice to alter record.	
3046, 3048	ANDREWS v. SNYDER.....	333
	Appeal from justice's court; mode of service of notice of appeal.	
3063	IRR v. SCHROEDER.....	253
	Justice of the peace; effect of error in costs on judgment.	
3070	ALLEN v. SWAN.....	56
	Justice's court; appeal; right to costs.	
3174	OAKES v. HARWAY.....	357
	City court of New York; counter-claims in action in, brought by executor.	
3191	WALSH v. SCHULZ.....	126
	City court of New York: appeals from discretion- ary orders of; relation of court of common pleas to.	
3191	WILLMORE v. FLACK.....	191
	Appeal from N. Y. city court to N. Y. court of common pleas; no jurisdiction where new trial ordered unless consent to final judgment on such appeal is given.	
3209-3211	STERN v. MOSS.....	184
	Arrest in N. Y. district courts.	
3247	REMINGTON PAPER Co v. O'DOUGHERTY.....	79
	Obligation created by statute not contract.	
3251	WOODFORD v. RASBACK.....	315
	WOODFORD v. CHAPMAN.....	315
	Fees of referee appointed to take proof on motion.	
3253	RUTTY v. PERSON.....	25
	Allowance; what is sufficient monetary basis for.	
3253	BORD v. N. Y. C. & H. R. R. Co.....	224

CONTENTS.

xiii

Sections of the Code of Civil Procedure. }		Page
	Extra allowance; basis of, in action for causing death.	
3268	KROM <i>v.</i> KURSHEEDT.....	371
	Security for costs; non-residence.	
3268, 3269	FITZSIMMONS <i>v.</i> CURLEY.	156
	Same subject; laches.	
3278	KROM <i>v.</i> KURSHEEDT.....	371
	Security for costs; liability of attorney for costs.	
	CORNWELL <i>v.</i> DICKEL	416
	N. Y. district court; right of party to be heard in, by counsel on conclusion of case.	

TABLE OF CASES REPORTED.

A		Page		Page
Adams v. The City of Utica..	294	Conner, Ansonia Brass & Cop- per Co. v.	173	
Allen v. Swan.....	56	Cornwell v. Dickel.....	416	
Andrews v. Snyder.....	333	Curley, Fitzsimmons v.....	156	
Ansonia Brass & Copper Co. v. Conner.....	173	D		
Anthony v. Wood.....	164	Davenport Glucose Co. v. Taussig.....	152	
Apsley v. Wood.....	178	Davidson, Hayes v.....	330	
Assessors of Town of Herki- mer, People <i>ex rel.</i> Her- kimer & Mohawk R. R. Co. v.....	297	Davidson, Hayes v.....	377	
B		De Silver v. Holden.....	121	
Baird, Lidgerwood M'fg Co. v.	54	Devender, Orden Germania v.	161	
Bank for Savings, Gearon v..	207	De Vivier v. Smith.....	394	
Barnes v. Gilmore.....	286	Dickel, Cornwell v.....	416	
Biehler, Goettling v.....	324	Dock v. South Bkl'n Saw Mill Co.....	144	
Bogert, Estate of.....	128	E		
Bord v. N. Y. C. & H. R. R. R. Co.....	222	Earle v. Earle (note).....	171	
Boynton Saw & File Co., <i>In re</i>	342	E. M. Boynton Saw & File Co. <i>In re</i>	342	
Bunzl, Goodwin v.....	226	Engle v. Fischer.....	307	
C		Epstein, Strohn v.....	36	
Chapman, Woodford v.....	315	F		
City of Utica, Adams v.....	294	Feely v. Manhattan R. R. Co.	414	
Climm, Frist v.....	30	Fischer, Engle v.....	307	
Cole v. McGarvey.....	305	Fischer, Haberstick v.....	82	
Collins, Estate of.....	85	Fitzsimmons v. Curley.....	156	
		Flack, Willmore v.....	191	

TABLE OF CASES REPORTED.

KV

	Page		Page
Fogarty, Smith v.....	366	L	
Frist v. Climn.....	30	Laude v. Smith.....	51
		Learned v. Tillotson.....	225
G		Le Baron, Estate of.....	62
Gilmore, Barnes v.....	286	Lewis, Muser v.....	135
Goettling v. Biehler.....	324	Lidgerwood Mfg Co. v. Baird	54
Goodwin v. Bunzl.....	226	Lindner, Kaufman v.....	148
		Lippincott v. Westray.....	74
H		Little v. Lynch.....	418
Haberstich v. Fischer.....	82	Livingston v. Morrissey.....	28
Hannibal & St. Jo. R. R. Co.,		Lynch, Little v.....	418
Hurd v.....	386		
Hanson, Stephenson v.....	43	M	
Harway, Oakes v.....	357	McBlaine v. Speelman.....	401
Hayes v. Davidson.....	330	McGarvey, Cole v.....	305
Hayes v. Davidson.....	377	McGean v. MacKellar.....	169
Heenan v. N. Y., W. S. & B.		McNeirney, Keeler v.....	363
R. R. Co.....	348	MacKellar, McGean v.....	169
Henderson v. Scott.....	39	Manhattan R. R. Co., Feely v.	414
Holder, De Silver v.....	121	Mehesy v. Kahn.....	33
Holmes, Booth & Hayden v.		Meldrum, Taylor v.....	235
Stietz (note).....	362	Morton, Viadero v.....	238
Hurd v. Hannibal & St. Jo.		Morrissey, Livingston v.....	28
R. R. Co.....	386	Moss, Stern v.....	184
		Munoz, Wilson v.....	71
I		Muser v. Lewis.....	135
Irr v. Schroeder.....	253		
		N	
J		N. Y. C. & H. R. R. R. Co.,	
Jenks v. Van Brunt.....	158	Boyd v.....	222
Jones, <i>In re</i>	250	N. Y., W. S. & B. R. R. Co.,	
		<i>In re</i> , to acquire land of	
K		Judson.....	302
Kahn, Mehesy v.....	33	N. Y., W. S. & B. R. R. Co.,	
Kaufman v. Lindner.....	148	Heenan v.....	348
Keeler v. McNeirney.....	363	N. Y., W. S. & B. R. R. Co.,	
Kent v. Popham.....	336	U. S. Trust Co. v.....	90
Knapp v. Simon.....	1	North River Construction Co.,	
Kreis, Straus v.....	77	Phoenix Foundry & Ma-	
Krom v. Kursheedt.....	371	chine Co. v.....	106
Kursheedt, Krom v.....	371	North River Construction Co.,	
		Woerishoffer v.....	113

O

O		Page	Page
Oakes v. Harway.....	357	Seligman v. Wallach	233
O'Dougherty, Remington Pa- per Co. v.....	79	Simon, Knapp v.....	1
Orden Germania, Devender v.	161	Singer, Estate of.....	389
Osborne, People <i>ex rel.</i> Hoyle v.	299	Smith, De Vivier v.....	394
		Smith v. Fogarty	366
		Smith, Lande v.....	51

P

Parsons, Sprague <i>v.</i>	26	Dock <i>v.</i>	144
Peck, Sniffen <i>v.</i>	188	Speelman, McBlaine <i>v.</i>	401
People <i>ex rel.</i> Herkimer & Mohawk R. R. Co. <i>v.</i> Assessors of the town of Herkimer.	297	Sprague, Parsons <i>v.</i>	26
People <i>ex rel.</i> Hoyle <i>v.</i> Osborne	299	Stagg, Estate of	88
Person, Ratty <i>v.</i>	25	Stephenson <i>v.</i> Hanson.....	43
Phelps <i>v.</i> Phelps.....	117	Stern <i>v.</i> Moss.....	184
Phoenix Foundry & Machine Co. <i>v.</i> North River Construction Co.....	106	Steitz, Holmes, Booth & Hayden <i>v.</i>	362
Popham, Kent <i>v.</i>	336	Straus <i>v.</i> Kreis.....	77
Powers, <i>In re.</i>	326	Strohn <i>v.</i> Epstein.....	36
Pruden <i>v.</i> Tallman	360	Swan, Allen <i>v.</i>	56
		Sweet <i>v.</i> Sanderson Bros. Steel Co.....	69
		Syracuse Savings Bank <i>v.</i> Burton.....	216

R

Rasback, Woodford v.....	315	Talman, Pruden v.....	309
Reis v. Rhode	406	Taussig, Davenport Glucose Co. v.....	152
Remington Paper Co. v. O'- Dougherty	76	Taylor v. Meldrum.....	235
Rhode, Reis v	406	Thomas v. Utica & Black River R. R. Co.....	353
Rintoul, White v.	259	Tilden, Estate of.....	15
Ross v. Wigg.....	263	Tillotson, Learned v.....	225
<i>Ross v. Wigg (note)</i>	268		
Rutty v. Person.....	25		

5

Sanderson Bros. Steel Co.,		S. & B. R. R. Co.....	90
Sweet v.....	69		
Schroeder, Irr v.....	253	V	
Schultz, Walsh v.....	126	Van Brunt, Jenks v.....	158
Scott, Henderson v.....	39	Viadero v. Morton.....	238

T

Tallman, Pruden <i>v.</i>	300
Taussig, Davenport Glucose Co. <i>v.</i>	152
Taylor <i>v.</i> Meldrum.....	235
Thomas <i>v.</i> Utica & Black River R. R. Co.....	353
Tilden, Estate of.....	15
Tillotson, Learned <i>v.</i>	225

U

U. S. Trust Co. v. N. Y., W.
S. & B. R. R. Co..... 90

V

Van Brunt, Jenks v.....	158
Viadero v. Morton.....	238

TABLE OF CASES REPORTED.

xvii

W		Page
Wallach, Seligman <i>v.</i>	232	Woerishoffer <i>v.</i> North River Construction Co 113
Walsh <i>v.</i> Schultz.....	126	Wood, Anthony <i>v.</i> 164
Westray, Lippincott <i>v.</i>	74	Wood, Apsley <i>v.</i> 178
White <i>v.</i> Rintoul.....	259	Woodford <i>v.</i> Chapman. 315
Wigg, Ross <i>v.</i>	263	Woodford <i>v.</i> Rasback..... 315
Wigg, Ross <i>v.</i> (note).....	268	
Willmore <i>v.</i> Flack.....	191	Y
Wilson <i>v.</i> Munoz.....	71	York, Estate of..... 245

TABLE OF CASES CITED

IN THE OPINIONS.

A.		
Cases.	Where Reported.	Page Cited
Alford v. Cobb	28 Hun, 22.....	271
Allen v. Peters	4 Phila. 78.....	441
Alling v. Fahey.....	70 N. Y. 571.....	127
Ansonia Brass & Copper Co. v. Babbitt.....	8 Hun, 157.....	176
Ansonia Brass & Copper Co. v. Babbitt	74 N. Y. 395.....	176
Ansonia Brass & Copper Co. v. Connor.....	3 N. Y. Civ. Pro. 88	175
Anthorne v. Coit.....	2 Hall, 40.....	443
Ashley v. Turner.....	22 Hun, 226.....	38
Attorney General v. Guardian Mut'l Life Ins. Co.....	77 N. Y. 272	109, 111, 113
Attorney General v. North Am. Life Ins. Co.....	6 Abb. N. C. 293	113
Attrill v. Rockaway Beach Imp. Co.....	25 Hun, 378	103, 112
Averill v. Patterson.....	10 N. Y. 500.....	306

B.		
Bachelder v. Low.....	8 Nat'l Bank'cy Reg. 571.....	66
Ballard v. Burrows.....	2 Robt. 206	352
Bamberg v. Stern.....	76 N. Y. 555	123
Barrett v. Selling.....	70 N. Y. 492	231
Barrett v. 3d Av. R. R. Co.....	45 N. Y. 628	321
Barry v. Bockover.....	6 Abb. Pr. 374	376
Basey v. Gallagher.....	20 Wall. (U. S.) 670.....	436
Bathgate v. Haskins.....	59 N. Y. 533.....	296
Baum v. Muller.....	47 N. Y. 579	139
Bean v. Tonnelle.....	1 N. Y. Civ. Pro. 33.....	269
Beaver v. Taylor.....	1 Wall. (U. S.) 637	439
Beebe v. Elliott.....	4 Barb. 457.....	41

TABLE OF CASES CITED.

xix

Cases.	Where Reported.	Page Cited.
Beers v. Hendrickson.....	45 N. Y., 665.....	321
Beldon v. N. Y. & H. R. R. Co.....	15 How. Pr. 17.....	350
Belmont v. Cornen.....	82 N. Y. 256.....	220
Bennett v. Edwards.....	27 Hun, 352.....	272
Berrier v. Steel.....	1 N. Y. Civ. Pro. 579 <i>note</i>	52
Bertles v. Nunan.....	92 N. Y. 152.....	140
Bevan v. Cooper.....	72 N. Y. 317.....	248
Bidleson v. Whytel.....	3 Burr. (Eng. K. B.) 1545.....	81
Bigler v. Pinkney.....	80 N. Y. 636.....	326
Bills v. Nat. Park Bank.....	89 N. Y. 343.....	168
Birdsall v. Pattersen.....	51 N. Y. 43.....	436
Blaisdell v. Raymond.....	3 Abb. Pr. 144, <i>affd.</i> 6 Id. 148.....	31
Bootle v. Blundell.....	19 Ves. Jr. (Eng. Chy.) 494.....	436
Brazill v. Isham.....	1 E. D. Smith 437; <i>affd.</i> 12 N. Y. 9.....	41
Brinckerhoff v. Bostwick.....	88 N. Y. 52.....	95
Brotherton v. Downey.....	21 Hun, 436.....	55
Browne v. Volkening.....	64 N. Y. 77.....	365
Buckley v. Gutta Percha & Rubber Co.....	3 N. Y. Civ. Pro. 432.....	517

C.

Carr v. Van Hoesen.....	26 Hun, 316.....	406
Castle v. Lewis.....	78 N. Y. 131.....	167
Chaine v. Wilson.....	1 Bosw. 673.....	376
Chamberlain v. Rochester S. P. V. Co.....	7 Hun, 557.....	346
Champlin v. Stoddard.....	17 N. Y. Weekly Dig. 76.....	361
Chapman v. O'Brien.....	39 N. Y. Super. Ct. 244.....	381
Church v. Gristgan.....	34 Wisc. 328.....	412
Clapp v. Bromagham.....	9 Cow. 530.....	43
Clapper v. Fitzpatrick.....	3 How. Pr. 314; S. C., 1 Code R. 69.....	31
Clark v. Clark.....	11 Abb. N. C. 333.....	38
Clark v. Ford.....	1 Abb. Ct. App. Dec. 359.....	90
Cleveland v. Barrows.....	59 Barb. 374.....	124
Clock v. Chadeayne.....	10 Hun, 97.....	90
Cobb v. Knapp.....	71 N. Y. 348.....	8
Cole v. Jessup.....	10 N. Y. 96.....	314
Cole v. Terpenning.....	25 Hun, 482.....	87
Coleman v. Burr.....	93 N. Y. 17.....	140
Coles v. Hannigan.....	8 Daly, 43.....	185, 187
Colie v. Tift.....	4 N. Y. 119.....	436
Collins v. Campfield.....	9 How. Pr. 519.....	370

Cases.	Where Reported.	Page Cited.
<i>Collins v. Ryan</i>	32 Barb. 647.....	370
<i>Concklin v. Taylor</i>	68 N. Y. 221.	320, 324
<i>Considerant v. Brisbane</i>	22 N. Y. 389.....	14
<i>Cornelius v. Barton</i>	12 N. Y. Weekly Dig. 216.420	424
<i>Corning v. Smith</i>	6 N. Y. 82.....	341
<i>Cottrell, In re</i>	5 N. Y. Civ. Pro. 340	133
<i>Coulter v. Murray</i>	15 Abb. N. S. 129.....	411
<i>Cowing v. Altman</i>	79 N. Y. 167	11
<i>Cox v. N. Y. C. R. R. Co</i>	63 N. Y. 414	321
<i>Cudler v. Curry</i>	44 How. Pr. 349.....	244
<i>Currier v. N. Y., W. S. & B. R. R.</i> Co	Unreported	105
<i>Cutler v. Wright</i>	22 N. Y. 472	277

D.

<i>Darraw v. Lee</i>	16 Abb. Pr. 215.....	394
<i>Daidsburg v. Knickerbocker Life</i> Ins. Co ...	90 N. Y. 526	352
<i>Day v. Bach</i>	87 N. Y. 56	27
<i>Decker v. Matthews</i>	12 N. Y. 313	124
<i>Dickinson v. Mitchell</i>	19 Abb. Pr. 286.....	296
<i>Draper v. Crofts</i>	15 Mees. & Wels. (Eng. Excr.) 166.....	443
<i>Duncan v. Guest</i>	2 N. Y. Civ. Pro. 275.....	272

E.

<i>Eagan v. Lynch</i>	3 N. Y. Civ. Pro. 236.....	50
<i>Eagle Fire Ins. Co. v. Lent</i>	6 Paige, 635.....	341
<i>Eagle Iron Works, In re</i>	8 Paige, 385.....	346
<i>Earle v. Earle</i>	6 N. Y. Civ. Pro. 171 note....	171
<i>Ellison v. Bernstein</i>	60 How. Pr. 145	369
<i>Emigrant Ind. Sav. Bank v. Gold-</i> man	75 N. Y. 127.....	340, 365
<i>Erie R. R. Co. v. Ramsey</i>	45 N. Y. 637	110
<i>Ewing v. Thompson</i>	43 Pa. St. 372	412

F.

<i>Fairlie v. Denton</i>	3 Carr & P. (Eng. N. P.) 103.	443
<i>Featherstone v. Cooke</i>	L. R. 16 Eq. 298.....	412
<i>Felt v. Tiffany</i>	11 Hun, 63.....	296
<i>Fenno v. Weston</i>	31 Vt. 345	441
<i>Field v. Van Cott</i>	5 Daly, 308	240
<i>Fiester v. Shepard</i>	92 N. Y. 251.....	249
<i>Fitzgerald v. Quann</i>	1 N. Y. Civ. Pro. 273.....	52, 143

TABLE OF CASES CITED.

xxi

Cases.	Where Reported.	Page Cited.
Fitzsimons v. Harrington	1 N. Y. Civ. Pro. 360.....	52
Florence v. Hopkins	46 N. Y. 182.....	43
Foot v. Harris	2 Abb. Pr. 454.....	370
Ford v. Babcock	2 Sand. 518.....	314
Fowler v. Bailey	3 Mass. 201.....	314
Fowler v. Hunt	10 Johns. 464.....	314
Fraenznick v. Miller	1 Dem. 136.....	246, 247
Fraser, Matter of	92 N. Y. 239.....	64
Fredericks v. Taylor	14 Abb. Pr. N. S. 77.....	31
French Mfg Co., Matter of	12 Hun, 448.....	346
Fritz v. Pultz	2 N. Y. Civ. Pro. 142....	255, 257
Frost v. Koon	30 N. Y. 428.....	341, 366

G.

Gasherie v. Apple	14 Ab. Pr. 64.....	282
Gaskill v. Skene	14 Adol. & E., N. S. (Eng. Q. B.) 664.....	441
Geib v. Topping	83 N. Y. 46.....	420, 422, 424
Gemp v. Pratt	7 Daly, 197.....	351
Gillard v. Smart	6 Cow. 385.....	321
Goodrich v. Russell	42 N. Y. 85.....	329
Gordon v. Hartman	89 N. Y. 221.....	262
Gould v. Mortimer	26 How. Pr. 167; S. C., 16 Abb. Pr. 448.....	94
Gram v. Prussia, &c. Society	36 N. Y. 161.....	411
Griffiths v. Hardenburg	41 N. Y. 464.....	381
Griswold, Matter of	13 Barb. 412.....	406
Guillaume v. Rowe	48 N. Y. Supr. Ct. 179....	210, 213

H.

Hall v. Hall	81 N. Y. 180.....	329
Hall v. U. S. Reflector Co.	31 Hun, 609.....	97
Hallenbeck v. Donnell	94 N. Y. 342.....	99
Hammond v. Earle	58 How. Pr. 437....	27
Hampson v. Hampson	3 Ves. & Bea. (Eng. Chy.) 41.....	436
Harris v. Durkee	5 N. Y. Civ. Pro. 376.....	286
Hart v. Harvey	32 Barb. 55.....	410
Hawes v. Oakland	104 U. S. 450.....	95
Hein v. Davidson	5 N. Y. Civ. Pro. 391.....	382
Hendricks v. Decker	35 Barb. 298.....	41
Henry v. Salina Bank	1 N. Y. 83; S. C., 3 Den. 593; 1 How. App. Cas. 173....	31
Herring v. Hoppock	3 Duer. 20; aff'd 15 N. Y. 400.....	381
Hessburg v. Riley	2 N. Y. Civ. Pro. 165.....	382

Cases.	Where Reported.	Page Cited.
Hill v. Pratt.....	29 Vt. 119.....	443
Hockley, <i>In re</i>	24 N. Y. 74.....	31
Hoffman v. Lachman.....	1 N. Y. Civ. Pro. 278, <i>note</i> ...	52
Holbrook v. Baker.....	16 Hun, 176.....	352
Holcomb v. Holcomb.....	2 Barb. 20.....	365
House v. Agate.....	3 Redf. 307.....	86
Howell v. Mills.....	53 N. Y. 331.....	127

I.

Ingersoll v. Mangam.....	84 N. Y. 623.....	220
--------------------------	-------------------	-----

J.

Jackson v. Guman.....	2 Cow. 552.....	279
Jackson v. Livingston.....	8 Johns. 149.....	279
James v. Cowing.....	82 N. Y. 449.....	325
Janinski v. Heidelberg.....	21 Hun, 439.....	52
Johnson v. Florence.....	32 How. Pr. 230.....	187
Johnson v. Jones.....	23 N. J. Eq. 216.....	411
Jones v. Derby.....	1 Abb. Pr. 459.....	370

K.

Kamp v. Kamp.....	59 N. Y. 212.....	97
Keen v. Priest.....	1 Foster & Fin. (Eng. N. P.) 314.....	440
Kellett v. Rathbun.....	4 Paige, 102.....	19, 392
Kerr v. Mount.....	28 N. Y. 659.....	27
Kerr v. Trego.....	47 Pa. St. 292.....	409, 412
Knapp v. Roche.....	18 Weekly Dig. 324.....	143
Kowing v. Manley.....	49 N. Y. 192.....	52

L.

Landers v. S. I. R. R. Co.....	53 N. Y. 450.....	351, 352
Lathrop v. Clapp.....	40 N. Y. 33.....	233
Lawrance v. Farley.....	73 N. Y. 187.....	127, 128
Lawrence v. Foxwell.....	4 N. Y. Civ. Pro. 351.....	78
Levy, Matter of.....	2 N. Y. Civ. Pro. 108.....	376
Lewis v. Smith.....	9 N. Y. 502.....	365
Little v. Blunt.....	33 Mass. 359.....	314
Livermore v. Rhodes.....	27 How Pr. 506.....	282
Lobdell v. Lobdell.....	36 N. Y. 327.....	85
Loder v. Hatfield.....	71 N. Y. 92.....	90
Lorillard v. Clyde.....	86 N. Y. 384.....	275
Luhrs v. Eimers.....	85 N. Y. 171.....	329
Lutheran Ev. Ch. v. Gurtzan.....	24 Wisc. 328.....	409
Lynch v. Clark.....	1 Sand. Ch. 604.....	323

TABLE OF CASES CITED.

xxiii

M.		
Cases.	Where Reported.	Page Cited.
McCartee v. Camel.....	1 Barb. Ch. 455.....	89
McConn v. N. Y. C. & H. R. R. Co	50 N. Y. 176	81
McEleere v. Little	8 Daly, 167	127
McGoldrick v. Willits.....	52 N. Y. 612	12
McKyring v. Bull.....	16 N. Y. 297	41
McLachlin v. Brett	2 N. Y. Civ. Pro. 194	148
McMahon v. Rauber.....	47 N. Y. 67.....	203
McNeary v. Chase.....	30 Hun, 491.....	256, 257
Mahony v. Penman.....	4 Duer, 603.....	120
Malcomb v. O'Reilly.....	89 N. Y. 156.....	282
Manning v. Gould.....	90 N. Y. 476.....	230
Marie v. Garrison.....	83 N. Y. 28.....	125
Marshall v. Knox.....	16 Wall. (U. S.) 551.....	176
Marshall v. Meech.....	51 N. Y. 140.....	320
Marshall v. Mott	13 Johns. 423.....	270
Marter, <i>In re</i>	8 N. B. R. 188.....	176
Martin v. Windsor Hotel Co.....	70 N. Y. 101.....	296
Mason v. Marsh.....	35 Barb. 68.....	53
Mayhew v. Robinson.....	10 How. Pr. 162.....	352
Mayor v. Conover.....	5 Abb. Pr. 171.....	411
Méchanics' & Traders' Bank v. Healy.....	14 N. Y. Week. Dig. 120.....	234
Mequire v. Corwine.....	3 MacArthur (D. C.) 81.....	443
Mercein v. People.....	25 Wend. 64.....	300
Merchants' Bank of Canada v. Gris- wold	72 N. Y. 474.	276
Mérian v. Harsen.....	4 Edw. Ch. 70; aff'd 2 Barb. Ch. 232.....	279
Merritt v. Vegelius.....	28 Hun, 420.....	296
Mickles v. Rochester City B'k...	11 Paige, 118.....	410
Milne v. Leisler.....	7 Hurl. & N. (Eng. Exer.) 786.	439
Moloney v. Dows.....	2 Hilt. 247.....	31
Morris v. Whelan.....	11 Abb. N. C. 64; S. C., 64 How. Pr. 109.....	411
Mott v. Connally.....	50 Barb. 516.....	411
Muser v. Miller.....	3 N. Y. Civ. Pro. 388.....	52
N.		
N. Y. & E. R. R. Co. v. Corey..	5 How. Pr. 177.....	303
Nichols v. Michael.....	23 N. Y. 264.....	231
North Bap. Church v. Parker....	36 Barb. 171.....	410
Northrup v. Foot.....	14 Wend. 249	276

O.

Cases.	Where Reported.	Page Cited.
Olcott v. MacLean.....	73 N. Y. 223.....	352
Open Board of Brokers, <i>In re</i>	3 N. Y. Monthly Law. Bul. 57.	346
Ormes v. Dauchy.....	82 N. Y. 443.....	275
Orr v. McEwen.....	16 Hun, 625.....	371
O'Shea v. Kohn.....	33 Hun, 114.....	78

P.

Paine v. McCarthy.....	1 Hun, 78.....	70
Palmer v. Foley.....	44 How. Pr. 308; aff'd 4 J. & S. 14; S. C., 45 How. Pr. 110....	411
Patterson, <i>In re</i>	1 Benedict (U. S. Circ.) 307...	151
Paulding v. Hudson Man. Co....	2 E. D. Smith, 38.....	352
Payne v. Grant.....	23 Hun, 134.....	265
People v. A. & S. R. R. Co	57 N. Y. 161.....	410
People v. Conkling.....	5 Hun, 452.....	410
People v. Cooper.....	1 Duer, 709.....	301
People v. Cowsls.....	59 How. Pr. 287.....	301
People v. Fredericks.	48 Barb. 173; aff'd 48 N. Y. 70.	350
People <i>ex rel.</i> Ainslee v. Howlett.	13 Hun, 138; aff'd 76 N. Y. 574 292, 293	
People v. Humphreys.....	24 Barb. 591.....	301
People <i>ex rel.</i> Woolf v. Jacobs....	66 N. Y. 8.....	252
People v. Kelly.....	24 How. Pr. 369.....	31
People v. Lockwood.....	3 Hun, 304.....	443
People v. Matier.....	2 Abb. N. S. 289.....	410
People v. Mercein.....	8 Paige, 47.....	300
People v. Norton.....	9 N. Y. 178.....	243
People v. Pendleton.....	64 N. Y. 622.....	112
People <i>ex rel.</i> H. R. R. R. Co. v. Pierce.....	31 Barb. 138.	350
People v. Sturtevant.....	9 N. Y. 263.....	112
People <i>ex rel.</i> Ward v. Ward....	59 How. Pr. 174.....	301
People v. Wilcox.....	22 Barb. 178, 194, 195	300
Perkins v. Kendall.....	3 N. Y. Civ. Pro. 240	38
Perry v. Seward.....	6 Abb. Pr. 327.....	112
Phelps v. Phelps....	6 N. Y. Civ. Pro. 117; aff'd 32 Hun, 642.....	280
Phipps v. Carman.....	23 Hun, 150; aff'd 84 N. Y. 650 419, 420, 421, 423	
Phoenix Foundry & Machine Co. v. North River Construction Co.	6 N. Y. Civ. Pro. 106, 103, 106,	346
Platt v. Townsend.....	3 Abb. Pr. 9.....	190
Poillon v. Lawrence.....	77 N. Y. 207.....	66, 314

TABLE OF CASES CITED.

xxv

Cases.	Where Reported.	Page Cited.
Pomeroy v. Ainsworth.....	22 Barb. 118, 130	276
Pond v. H. R. R. Co.....	17 How. Pr. 543.....	350
Post v. Doremus.....	60 N. Y. 376.....	228, 229
Potter v. Tallman	35 Barb. 182	276
Poucher v. Blanchard.....	86 N. Y. 263.....	212
Pratt v. Elkins.....	80 N. Y. 198	73
Pratt M'fg Co. v. Jordan Iron, &c. Co	5 N. Y. Civ. Pro. 372	55
Purdy v. Hayt	92 N. Y. 446.....	249
Pyrolusite Manganese Co. <i>In re</i> ..	3 N. Y. Civ. Pro. 270.....	347

R.

Randall v. Wilkins	4 Denio, 577	314
Reims v. Astor Fire Ins. Co.....	59 N. Y. 148.....	111
Rennie v. Bean.....	24 Hun, 126	405
Ridley v. Gade.....	9 Bing. (Eng. N. P.) 349.....	440
Riggs v. Craig	89 N. Y. 479.....	248
Rinchev v. Stricker.....	28 N. Y. 45.....	166
Robertson v. Bullions.....	11 N. Y. 243.....	411
Robinson v. Fitchburg & W. R. R. Co	7 Gray (Mass.) 92.....	443
Rochester and Genesee Valley R. R. Co. v. Beckwith	10 How. Pr. 168.....	303
Rockford, &c. v. Boody.....	56 N. Y. 456, 460	272
Roe v. Day.....	7 Carr. & P. (Eng. N. P.) 698.....	441
Rogers v. Adriance	22 How. Pr. 97.....	148
Romaine v. Cornwell.....	11 Abb. N. S. 430	190
Ross, Matter of.....	87 N. Y. 514	435
Rowe v. Smith	45 N. Y. 233	139
Ruger v. Belden.....	27 Hun, 405.....	296
Rumsey v. Lake	55 How. Pr. 339.....	53
Ryan v. Hardy	26 Hun, 176.....	271

S.

Schell v. Erie Railway Co	51 Barb. 368	110
Schenck v. Fancher.....	14 How. Pr. 95.....	306
Schwartz v. Oppold.....	74 N. Y. 307	127
Scovill v. New	12 How. Pr. 319.....	31
Seacord v. Morgan.....	3 Keyes, 636	231
Severn v. National Bank of Troy.	18 Hun, 228.....	65
Seymour v. Minturn	17 Johns. 170.....	9
Sherwood v. S. & W. R. R. Co ..	15 Barb. 652	350
Smith v. Boyd	18 N. Y. Weekly Dig. 461....	405

Cases.	Where Reported.	Page Cited.
Smith v. Keal.....	46 L. T. Rep. N. S. 770	214
Smith v. Mason.....	14 Wall. (U. S.) 419.....	176
Smith v. White.....	7 Hill, 520.....	306
Southwick v. First Nat'l Bank....	84 N. Y. 420.....	11
Stackhouse v. French.....	1 Bing. 365.....	50
Stewart v. Emerson.....	8 Benedict (U. S. Circ.) 462..	150
Stoddard v. Key.....	62 How. Pr. 137.....	271
Story v. Dayton.....	22 Hun, 450.....	391
Sullivan v. Fraser.....	4 Robt. 620.....	352
Supervisors Rensselaer Co. v. Bates.	17 N. Y. 245.....	243
Sweet v. Tuttle.....	14 N. Y. 465.....	352

T.

Talcott v. Harris.....	93 N. Y. 567.....	442
Tappan v. Gray.....	3 Edw. Ch. 452; rev'd 9 Paige; 507; aff'd 7 Hill, 259.....	411
Thomas v. Reab.....	6 Wend. 503.....	296
Thompson v. Kitchum.....	8 Term R. 189	277
Thorndike v. City of Boston....	1 Metc. (Mass.) 242.....	440
Thornton v. Thornton.....	66 How. Pr. 119.....	420, 421
Thurber v. Blanck.....	50 N. Y. 80.....	167
Tilden, <i>In re</i>	6 N. Y. Civ. Pro. 154.....	392
Tillottson v. Wolcott.....	48 N. Y. 188.....	395
Titus v. Relyea.....	16 How. Pr. 371.....	119
Townsend v. Hendricks.....	40 How. Pr. 143.....	128
Tracy v. Stearns.....	12 N. Y. Weekly Dig. 533....	296
Trebing v. Vetter.....	12 Abb. N. C. 302, <i>note</i>	52
Troup v. Smith.....	20 Johns. 32	315
Tucker v. Ladd.....	4 Cow. 47.....	270
Tucker v. McDermott.....	2 Redf. 312.....	392

V.

Vermilyea v. Palmer	52 N. Y. 471.....	435, 436, 438
Verplanck, Matter of.....	91 N. Y. 439.....	247, 249

W.

Wallace v. Castle.....	68 N. Y. 370.....	376
Walsh v. Stearn.....	12 N. Y. Week. Dig. 424.....	112
Walters v. Shepherd.....	14 Hun, 223.....	419, 422
Waring v. Chamberlain.....	14 Week. Dig. 464.....	296
Waring v. U. S. Tel. Co.....	4 Daly, 233.....	443
Warner v. Kronkhite....	13 Benedict (U. S. C. C.) 52..	151
Warren v. Paff.....	4 Bradf. 260.....	90

TABLE OF CASES CITED.

xxvii

Cases.	Where Reported.	Page Cited.
Watt v. Starke.....	101 U. S. 247.....	436
Weetjen v. Vibbard.....	5 Hun, 265.....	95
Wehle v. Butler.....	61 N. Y. 245.....	27
Wehle v. Haviland.....	42 How. Pr. 399; S. C., 4 Daly, 550.....	27
Welsh v. Cochran.....	63 N. Y. 182.....	213
Welsh v. Hill.....	2 Johns. 373.....	270
Wertheim v. Continental Railway Co.....	3 N. Y. Civ. Pro. 371.....	363
West Side Bank v. Pugsley.....	47 N. Y. 368.....	395
Western T. & C. Co. v. Kilder- house.....	87 N. Y. 430.....	275
Wheeler v. Dixon.....	14 How. Pr. 151.....	31
Wheeler's Case.....	50 N. Y. 667.....	218
Wheelock v. Lee.....	74 N. Y. 497.....	352
Whitehouse, <i>In re</i>	4 Benedict (U. S. C. C.) 63...	151
Whitney v. N. Y. & Atlantic R. R. Co.....	5 N. Y. Civ. Pro. 118.....	101
Wilcox v. Wilcox.....	14 N. Y. 575.....	300
Wilkinson v. North River Con- struction Co.....	66 How. Pr. 423.....	103, 109, 112
Williams v. Kiernan.....	25 Hun, 358.....	244
Williams v. Preston.....	47 L. T. Rep. N. S. 265.....	214
Williams v. Waddell.....	5 N. Y. Civ. Pro. 191.....	286
Woerishoffer v. North River Con- struction Co.....	6 N. Y. Civ. Pro. 113.....	103
Wood v. Erie R. R. Co.....	72 N. Y. 176, 200.....	276
Wyman v. Mitchell.....	1 Cow. 316.....	81

Y.

Yates v. Lansing.....	9 Johns. 416.....	50
Yates v. North.....	44 N. Y. 271.....	368
Young v. Rummell.....	2 Hill, 478.....	41

Z.

Zimmerman v. Erhardt.....	83 N. Y. 74.....	271
---------------------------	------------------	-----

STATUTES, ETC., CITED.

SECTIONS OF THE CODE OF CIVIL PROCEDURE CITED.

Section	Page	Section	Page
8	252	568	269
11	252	610	112
190	126	635	81
241	298	636	271
341	351	636, subd. 2	270
388	86	648	168
396	86	649	167, 168
401	313	683	269
424	120	719	271, 273
437	370	723	298
438	218, 221	730	269
439	119, 219	769	96, 103, 108, 111, 112
449	244	811	170
450	52, 53, 142	828	64
454	240	829	64, 237, 238
478	71	837	31
484, subd. 6	124	844 119, 270, 271, 277, 278, 279, 284, 286	
488	352	854-857	252
498	352	867-869	362
500	41, 290	868	362, 363
501	290	869	363
507	352	972	437, 438
523	31, 32	977	83
524	55	1003	437, 438
529	31, 32, 33	1019	419, 420, 422, 423
549	151, 186	1023	325
549, subd. 4	77, 78, 186	1206	52
550	186, 271	1207	160
550, subd. 2	270	1216	371
559	49		

STATUTES, ETC., CITED.

xxix

Section	Page	Section	Page
1225	438	2464	37, 395
1260	321	2481	391
1268	149	2481, subd. 6	17
1304	187	2481, subd. 7	252
1326	171	2615	328
1337	435	2620	133
1352	262	2723	86
1399	187	2743	246
1421	380, 381	2750	63
1424	380	2876	255
1632	365	2894	186
1695, subd. 6	254	2901	256
1699	254	2902	256
1784	99	2904	186
1785	99	2916	256
1788	99	2917	256
1793	99	2920	254
1806	110	2925	256
1810	98, 99, 115	2933	256
1819	87	3002	252
1902	223, 354	3015	60
1903	355	3018	187
1904	223, 224	3048, subd. 2	336
1932	38	3049	336
1934	38	3174	360
1948-1956	410	3191	126, 128
1984	410	3209	186
1991	298	3210	186
1992	298	3211	186
2019	301	3247	80
2129	298	3251	324
2140	218	3253	223, 224, 225
2285	50, 251, 252	3256	223
2426	347	3268	157, 375, 376
2429	99, 345	3269	157
2435	233	3278	375, 376
2436	233	3347, subd. 6	391
2441	395	3347, subd. 11	391
2444	362, 363	Chap. 15, Tit. 4, Art. 1 (§§ 1871,	
2446	395	1879)	38
2447	395	Chap. 18 (§§ 2472, 2860)	391
2460	234	Chap. 19, Tit. 2, Art. 3 (§§ 2894,	
2461	38	2904)	186

SECTIONS OF THE CODE OF PROCEDURE CITED.

120	240
149	41
179	186
273	419, 420, 422

SESSION LAWS CITED.

Laws of 1829, chap. 222.	278
“ 1839, “ 205.	278
“ 1845, “ 109.	278
“ 1845, “ 115 § 4	329
“ 1847, “ 170.	278
“ 1847, “ 280 § 16	360
“ 1847, “ 280 § 16, subd. 21	301
“ 1848, “ 195.	278, 284, 285
“ 1849, “ 347.	271, 275, 276
“ 1850, “ 270.	278
“ 1853, “ 138.	241
“ 1854, “ 206.	284
“ 1857, “ 346 § 10	186
“ 1857, “ 346 § 16, subd. 3	185
“ 1858, “ 259.	278
“ 1860, “ 90.	139
“ 1860, “ 90 § 2	140, 141
“ 1860, “ 90 § 7	53, 141
“ 1860, “ 90 § 8	141
“ 1860, “ 348.	404, 405
“ 1860, “ 348 §§ 1, 2, 5, 6, 28	404
“ 1862, “ 172.	139
“ 1862, “ 172 § 3	53
“ 1863, “ 248.	278
“ 1867, “ 557.	119, 284, 285
“ 1869, “ 133.	119
“ 1870, “ 208.	278, 279, 284
“ 1874, “ 261.	329
“ 1874, “ 545.	202
“ 1875, “ 38.	329
“ 1875, “ 136.	278, 283

STATUTES, ETC., CITED.

xxxi

Laws of 1877, chap. 417.	283, 301
“ 1877, “ 417 § 1, subd. 3 (6)	119
“ 1877, “ 417 § 1, subd. 4 (43)	119
“ 1877, “ 466.	404
“ 1877, “ 466 §§ 1, 2.	404
“ 1879, “ 542.	151
“ 1880, “ 245.	53
“ 1881, “ 486.	262
“ 1881, “ 486 § 1	170, 171
“ 1881, “ 486 § 2	171
“ 1881, “ 486 § 3	171, 172, 173
“ 1883, “ 14 § 1	31
“ 1883, “ 281.	270, 275, 276
“ 1883, “ 378.	97, 99, 115, 116
“ 1883, “ 378 § 1	96, 100, 101, 104
“ 1883, “ 378 § 3	103
“ 1883, “ 378 § 5	102
“ 1883, “ 378 § 7	93
“ 1883, “ 378 § 8	101
“ 1883, “ 410 § 1386.	187

NEW YORK REVISED STATUTES CITED.

FIRST EDITION.

1 R. S. 757.	283	2 R. S. 148 § 12	300
1 R. S. 824.	298	2 R. S. 174.	81
1 R. S. 861.	293	2 R. S. 362 § 24	321
1 R. S. 935.	298	2 R. S. 396 § 25	119, 283
1 R. S. 946.	298	2 R. S. 932.	298
2 R. S. 95 § 71	247		

THIRD EDITION.

3 R. S. 253.	275
--------------	-----

SIXTH EDITION.

3 R. S. 102 § 76.	18
3 R. S. 104	247
3 R. S. 199 § 102	365

SEVENTH EDITION.

3 R. S. 2170 . . .	329	3 R. S. 2230 . . .	283
3 R. S. 2215 . . .	364	3 R. S. 2551 § 16 . . .	303
3 R. S. 2224 . . .	278, 283, 284		

GENERAL RULES OF PRACTICE CITED.

Rule 25 (1877, 1880, 1883).	269
Rule 37 (1877, 1880, 1883).	191

CONSTITUTION OF THE STATE OF NEW YORK
CITED.

Art. 1, § 6	81
Art. 6, § 15	351

U. S. REVISED STATUTES CITED.

§ 5024.	176
§ 5117.	150

TEXT-BOOKS, ETC., CITED.

2 Blackstone's Commentaries, 201.	328
3 Blackstone's Commentaries, 159.	81
Commissioner's Note to Code of Civil Procedure, § 817 (now § 844).	277, 278
Commissioner's Note to Code of Civil Procedure, § 1906 . . .	53
Daniel's Chancery Practice, 1146.	436
Dayton's Surrogate's Practice (3 Ed.) 506, 507 . . .	19, 22, 392

Dayton's Surrogate's Practice (3 Ed.) 543	22
1 Duer's Practice, 106, 312, 313.	270
1 Greenleaf on Evidence, § 186	176
2 High on Injunctions, § 315	409
Keiley on Assignments, 118-121	405
2 Kent's Commentaries, 53.	328
Lieber's Hermeneutics (3 Ed.) 285 <i>note</i>	318
McAdam on Landlord & Tenant, 422.	293
2 Parsons on Contracts, 582.	276
1 Phillips on Evidence, 524 (marg. p.)	176
2 Phillips on Evidence, Cowen, Hill & Edwards' Notes, 929	31
Revisors' Note to Code of Civil Procedure, § 817 (now § 844) 277, 278	
Revisors' Note to Code of Civil Procedure, § 1906	53
Story on Conflict of Laws, § 282.	276
Story's Equity Jurisprudence, § 891	110
Taylor on Evidence, § 585.	439
Throop's Code, note to § 844	277
Throop's Code, note to § 2464	395
Wait on Fraudulent Conveyances, § 86	167
Wood on Landlord & Tenant, 372	292

SECTIONS OF CODE OF CIVIL PROCEDURE

CONSTRUED OR CITED, IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: New York Reports, Vols. 95, 96; Hun's Reports, Vols. 32, 33; Abbott's New Cases, Vol. 14; Howard's Prac. Reports, Vol. 67; N. Y. Superior Court Reports, Vol. 50; Demarest's Reports, Vol. 2; N. Y. Civil Pro. Reports, Vol. 6.

2	Eisner <i>v.</i> Avery.....	2 Dem. 466.
8	<i>In re</i> Jones.....	6 N. Y. Civ. Pro. 250.
11	<i>In re</i> Jones.....	6 N. Y. Civ. Pro. 250.
14	Stephenson <i>v.</i> Hanson.....	6 N. Y. Civ. Pro. 43.
14	<i>In re</i> Jones.....	6 N. Y. Civ. Pro. 250.
17	Chatfield <i>v.</i> Hewlitt.....	2 Dem. 191.
33	Brooks <i>v.</i> Mexican Constr. Co.....	50 Super. 285.
55	Gearon <i>v.</i> Bank for Savings.....	6 N. Y. Civ. Pro. 207.
66	Smith <i>v.</i> Baum.....	67 How. Pr. 267.
66	Eisner <i>v.</i> Avery.....	2 Dem. 466.
147	Roach <i>v.</i> Odell.....	33 Hun, 320.
263	Brooks <i>v.</i> Mexican Nat'l. Constr. Co....	50 Super. 287.
267	Brooks <i>v.</i> Mexican Nat'l. Constr. Co....	50 Super. 287.
341	Heenan <i>v.</i> N. Y., W. S. & B. R. R. Co.	6 N. Y. Civ. Pro. 348.
375	Howell <i>v.</i> Leavitt.....	95 N. Y. 617.
380	People <i>ex rel.</i> Townshend <i>v.</i> Cady.....	50 Super. 402.
382	Knapp <i>v.</i> Simon.....	6 N. Y. Civ. Pro. 31.
386	Kydd <i>v.</i> Dalrymple.....	2 Dem. 630.
388	Estate of Staggs.....	6 N. Y. Civ. Pro. 88.
388	Estate of Collins.....	6 N. Y. Civ. Pro. 85.
388	Higgins <i>v.</i> Higgins.....	14 Abb. N. C. 22.
388	Syms <i>v.</i> The Mayor, &c.....	50 Super. 294.
395	Cotter <i>v.</i> Quinlan.....	2 Dem. 29.
395	Kydd <i>v.</i> Dalrymple.....	2 Dem. 630.
396	Estate of Collins.....	6 N. Y. Civ. Pro. 85.
401	Engle <i>v.</i> Fischer.....	6 N. Y. Civ. Pro. 307.
403	Cotter <i>v.</i> Quinlan.....	2 Dem. 29.
406	Mead <i>v.</i> Jenkins.....	95 N. Y. 31.
416	People <i>ex rel.</i> Field <i>v.</i> Nat'l Pacific R. R. Co.....	50 Super 458
419	Sweet <i>v.</i> Sanderson Bros. Steel Co.....	6 N. Y. Civ. Pro. 69.

421	Cole v. McGarvey.....	6 N. Y. Civ. Pro. 305.
422	Sweet v. Sanderson Bros. Steel Co.....	6 N. Y. Civ. Pro. 69.
424	Phelps v. Phelps.....	6 N. Y. Civ. Pro. 117.
435	Smith v. Fogarty.....	6 N. Y. Civ. Pro. 366.
436	Smith v. Fogarty.....	6 N. Y. Civ. Pro. 366.
437	Smith v. Fogarty.....	6 N. Y. Civ. Pro. 366.
438	Syracuse Savings Bank v. Burton.....	6 N. Y. Civ. Pro. 216.
438	Place v. Riley	32 Hun, 17.
439	Phelps v. Phelps.....	6 N. Y. Civ. Pro. 117.
439	Syracuse Savings Bank v. Burton.....	6 N. Y. Civ. Pro. 216.
447	Keeler v. McNeirney.....	6 N. Y. Civ. Pro. 363.
448	Spies v. Roberts.....	50 Super. 305.
449	Viadero v. Morton.....	6 N. Y. Civ. Pro. 238.
450	Laude v. Smith.....	6 N. Y. Civ. Pro. 51.
450	Muser v. Lewis.....	6 N. Y. Civ. Pro. 135.
450	Mapes v. Brown.....	14 Abb. N. C. 94.
450	Fitzgerald v. Quann.....	33 Hun, 652.
452	Tilden v. Dows.....	2 Dem. 489.
454	Viadero v. Morton.....	6 N. Y. Civ. Pro. 238.
468-477	Matter of Watson.....	2 Dem. 642.
472	Cole v. McGarvey.....	6 N. Y. Civ. Pro. 305.
479	Sweet v. Sanderson Bros. Steel Co.....	6 N. Y. Civ. Pro. 69.
481	Sprague v. Parsons.....	6 N. Y. Civ. Pro. 26.
484	De Silver v. Holden.....	6 N. Y. Civ. Pro. 121.
484	Teal v. City of Syracuse.....	32 Hun, 332.
488	Heenan v. N. Y. W. S. & B. R. R. Co..	6 N. Y. Civ. Pro. 348.
488	Taylor v. Metropolitan El. R. R. Co....	50 Super. 340.
490	Berney v. Drexell.....	32 Hun, 419.
498	Taylor v. Metropolitan El. R. R. Co....	50 Super. 340.
499	Heenan v. N. Y., W. S. & B. R. R. Co..	6 N. Y. Civ. Pro. 348.
499	Taylor v. Metropolitan El. R. R. Co....	50 Super. 340.
500	Henderson v. Scott.....	6 N. Y. Civ. Pro. 39.
500	Lidgerwood Mfg Co. v. Baird.....	6 N. Y. Civ. Pro. 54.
500	Barnes v. Gilmore.....	6 N. Y. Civ. Pro. 286.
500	Potter v. Frail.....	57 How. Pr. 445.
500	Spies v. Roberts.....	50 Super. 305.
500	Hoffman v. N. Y., &c. R. R. Co.....	50 Super. 405.
500	Thierry v. Crawford.....	33 Hun, 366.
501	Barnes v. Gilmore.....	6 N. Y. Civ. Pro. 286.
503	Herbert v. Day.....	33 Hun, 461.
519	Spies v. Roberts.....	50 Super. 305.
522	Spies v. Roberts.....	50 Super. 305.
523-526	Moorehouse v. Hutchinson.....	2 Dem. 429.
523	Frist v. Climmm.....	6 N. Y. Civ. Pro. 30.
523	Anderson v. Doty.....	33 Hun, 232.

524	Lidgerwood M'fg Co. v. Baird.....	6 N. Y. Civ. Pro. 54.
528	Phelps v. Phelps	6 N. Y. Civ. Pro. 117.
529	Frist v. Climm.....	6 N. Y. Civ. Pro. 30.
531	Orden Germania v. Devender.....	6 N. Y. Civ. Pro. 161.
531	Sniffen v. Peck.....	6 N. Y. Civ. Pro. 188.
531	Hayes v. Davidson.....	6 N. Y. Civ. Pro. 330.
531	Feely v. Manhattan R. Co.....	6 N. Y. Civ. Pro. 414.
539	Knapp v. Simon.....	6 N. Y. Civ. Pro. 1.
539	Davis v. Bowe	50 Super. 391.
539	Spies v. Roberts	50 Super. 305.
540	Knapp v. Simon.....	6 N. Y. Civ. Pro. 1.
540	Davis v. Bowe....	50 Super. 391.
540	Spies v. Roberts.....	50 Super. 395.
541	Knapp v. Simon.....	6 N. Y. Civ. Pro. 1.
541	Davis v. Bowe.....	50 Super. 395.
549	Straus v. Kreis....	6 N. Y. Civ. Pro. 77.
549	Stern v. Moss.....	6 N. Y. Civ. Pro. 184.
549	Ryle v. Brown.....	50 Super. 175.
549, subd. 1.	Kaufman v. Lindner....	6 N. Y. Civ. Pro. 148.
550	Stern v. Moss.....	6 N. Y. Civ. Pro. 184.
550	Ross v. Wigg.....	6 N. Y. Civ. Pro. 263, 268.
550, subd. 1.	Lippman v. Shapiro.....	50 Super. 370.
559	O'Shea v. Kohn....	33 Hun, 114.
602 et seq.	Phoenix Foundry, &c. Co. v. North River Construction Co.....	6 N. Y. Civ. Pro. 106.
603 et seq.	Reis v. Rhode.....	6 N. Y. Civ. Pro. 406.
635	Remington Paper Co. v. O'Dougherty....	6 N. Y. Civ. Pro. 79.
635 et seq.	McBlane v. Speelman	6 N. Y. Civ. Pro. 402.
636	Ross v. Wigg.....	6 N. Y. Civ. Pro. 263, 268.
636	Smith v. Fogarty.....	6 N. Y. Civ. Pro. 360.
636	McKinlay v. Fowler	67 How. Pr. 388.
636	Smith v. Arnold.....	33 Hun, 484.
640	Sprague v. Parsons.....	6 N. Y. Civ. Pro. 26.
648	Anthony v. Wood.....	6 N. Y. Civ. Pro. 164.
649, 650.	Anthony v. Wood....	6 N. Y. Civ. Pro. 164; 96 N. Y. 180.
655	Davidson v. Chatham Nat'l Bank.....	32 Hun, 138.
675	Davidson v. Chatham Nat'l Bank	32 Hun, 138.
682	McBlane v. Speelman.....	6 N. Y. Civ. Pro. 401.
719	Ross v. Wigg.....	6 N. Y. Civ. Pro. 263, 268.
723	People ex rel. Herkimer & Mohawk R. R. v. Assessors of Herkimer.....	6 N. Y. Civ. Pro. 297.
723	Mapes v. Brown	14 Abb. N. C. 94.
723	Spies v. Roberts.....	50 Super. 305.
724	Gade v. Gade.....	14 Abb. N. C. 511.
727	Mapes v. Brown.....	14 Abb. N. C. 94.

738	Garrison v. Garrison.....	67 How. Pr. 271.
755	Dock v. South Brooklyn Saw Mill Co. . .	6 N. Y. Civ. Pro. 144.
756	Dock v. South Brooklyn Saw Mill Co. . .	6 N. Y. Civ. Pro. 144.
756	Tilden v. Dows.....	2 Dem. 489.
757	Dock v. South Brooklyn Saw Mill Co. . .	6 N. Y. Civ. Pro. 144.
768	People v. City Bank.....	96 N. Y. 32.
769	Phoenix Foundry & Machine Co. v. North River Construction Co.....	6 N. Y. Civ. Pro. 106.
769	U. S. Trust Co. v. N. Y., W. S. & B. . . . R'y Co.....	6 N. Y. Civ. Pro. 90.
776	Apsley v. Wood.....	6 N. Y. Civ. Pro. 178.
779	Scofield v. Adriance.....	2 Dem. 486.
781	Sniffen v. Peck.....	6 N. Y. Civ. Pro. 188.
783	Sniffen v. Peck.....	6 N. Y. Civ. Pro. 188.
783	Gade v. Gade.....	14 Abb. N. C. 511.
788	Matter of Carhart.....	2 Dem. 627.
791	McArthur v. Commercial Fire Ins. Co. . .	67 How. Pr. 510.
793	McArthur v. Commercial Fire Ins. Co. . .	67 How. Pr. 510.
803,	<i>et seq.</i> Mehesy v. Kahn.....	6 N. Y. Civ. Pro. 33.
811	McGean v. MacKellar.....	6 N. Y. Civ. Pro. 169.
811	Earle v. Earle.....	6 N. Y. Civ. Pro. 171.
812	Stephenson v. Hanson.....	6 N. Y. Civ. Pro. 13.
812	Hurd v. Hannibal & St. Jo. R. R.	33 Hun, 109; S. C., 6 Civ. Pro. 386.
823	Carroll v. Deimel.....	95 N. Y. 252.
827	Apsley v. Wood.....	6 N. Y. Civ. Pro. 178.
828	Wilson v. Munoz.....	6 N. Y. Civ. Pro. 71.
828	Estate of Le Baron.....	6 N. Y. Civ. Pro. 62.
828	Neuman v. Third Ave. R. R Co.....	50 Super. 415.
829	Wilson v. Munoz.....	6 N. Y. Civ. Pro. 71.
829	Estate of Le Baron.....	6 N. Y. Civ. Pro. 62.
829	Taylor v. Meldrum.....	6 N. Y. Civ. Pro. 235.
829	Stephens v. Cornell.....	32 Hun, 414.
829	Sanford v. Ellithorpe.....	95 N. Y. 48.
829	Holcomb v. Holcomb.....	95 N. Y. 316.
829	Lane v. Lane.....	95 N. Y. 494.
829	Will of Smith.....	95 N. Y. 517.
829	Poucher v. Scott.....	33 Hun, 223.
829	Price v. Price.....	33 Hun, 69.
829	Kelly v. Burroughs.....	33 Hun, 349.
829	Gillies v. Kreuder.....	33 Hun, 314.
837	Davenport Glucose Co. v. Taussig.....	6 N. Y. Civ. Pro. 152.
844	Phelps v. Phelps.....	6 N. Y. Civ. Pro. 117.
844	Ross v. Wigg.....	6 N. Y. Civ. Pro. 263, 268.
867	Pruden v. Tallman.....	6 N. Y. Civ. Pro. 360.

867	Holmes v. Stietz.....	6 N. Y. Civ. Pro. 362.
868	Pruden v. Tallman.....	6 N. Y. Civ. Pro. 360.
868	Holmes v. Stietz.....	6 N. Y. Civ. Pro. 362.
869	Pruden v. Tallman.....	6 N. Y. Civ. Pro. 360.
869	Holmes v. Stietz.....	6 N. Y. Civ. Pro. 362.
870,	<i>et seq.</i> Davenport Glucose Co. v. Taussig	6 N. Y. Civ. Pro. 152.
870	Duncan v. Jones.....	32 Hun, 12.
872	Cadmus v. Oakley.....	2 Dem. 298.
885	Reynolds v. Parkes.....	2 Dem. 399.
887	Cadmus v. Oakley.....	2 Dem. 298.
889	Cadmus v. Oakley.....	2 Dem. 298.
910	Hedges v. Williams.....	33 Hun, 546.
956	People v. D'Argencour.....	95 N. Y. 624.
957	People v. D'Argencour.....	95 N. Y. 624.
958	People v. D'Argencour.....	95 N. Y. 624.
968	Cornell v. Cornell.....	96 N. Y. 108.
970,	971, 972 Learned v. Tillotson.....	6 N. Y. Civ. Pro. 425.
971	Carroll v. Deimel.....	95 N. Y. 252.
977	Haberstich v. Fischer.....	6 N. Y. Civ. Pro. 82.
982	Gorman v. South Boston Iron Co.....	32 Hun, 71.
982	Acker v. Leland.....	96 N. Y. 383.
983	Gorman v. South Boston Iron Co.....	32 Hun, 71.
984	Gorman v. South Boston Iron Co.....	32 Hun, 71.
987	Gorman v. South Boston Iron Co.....	32 Hun, 71.
987	Acker v. Leland.....	96 N. Y. 383.
993	Goettling v. Biehler.....	6 N. Y. Civ. Pro. 324.
997	<i>In re</i> N. Y., W. S. & B. R. R. Co. to acquire lands of Judson.....	6 N. Y. Civ. Pro. 302.
998	Matter of Jackson.....	32 Hun, 260.
999	Emperich v. Heffernan.....	33 Hun, 54.
1003	Carroll v. Deimel.....	95 N. Y. 252.
1003	Learned v. Tillotson	6 N. Y. Civ. Pro. 425.
1013	Adams v. City of Utica.....	6 N. Y. Civ. Pro. 294.
1019	Little v. Lynch.....	6 N. Y. Civ. Pro. 418.
1023	Goettling v. Biehler.....	6 N. Y. Civ. Pro. 324.
1023	Diekel v. Yates.....	2 Dem. 229.
1023	Harris v. VanWart.....	96 N. Y. 642.
1206	Laude v. Smith.....	6 N. Y. Civ. Pro. 51.
1207	Jenks v. Van Brunt.....	6 N. Y. Civ. Pro. 158.
1207	Spies v. Roberts.....	50 Super. 301.
1216	Smith v. Fogarty.....	6 N. Y. Civ. Pro. 366.
1260	Woodford v. Rasback	6 N. Y. Civ. Pro. 315.
1260	Woodford v. Chapman.....	6 N. Y. Civ. Pro. 315.
1268	Kaufman v. Lindner.....	6 N. Y. Civ. Pro. 148.
1279	Bloomfield v. Ketcham.....	95 N. Y. 657.

1290	Marshall v. McGee.....	33 Hun, 354.
1301	Reese v. Smith.....	95 N. Y. 645.
1312	Hills v. Peoples Savings Bank.....	95 N. Y. 675.
1316	De Silver v. Holden.....	6 N. Y. Civ. Pro. 121.
1316	Reese v. Smith.....	95 N. Y. 645.
1318	Palmer v. Vernon.....	67 How. Pr. 18.
1326	McGean v. MacKellar.....	6 N. Y. Civ. Pro. 169.
1326	Earle v. Earle.....	6 N. Y. Civ. Pro. 171.
1326,	<i>et seq.</i> Hurd v. Hannibal & St. Joseph R.	
	R. Co.....	6 N. Y. Civ. Pro. 386.
1328	Goodwin v. Bunzl.....	6 N. Y. Civ. Pro. 226.
1329	Goodwin v. Bunzl.....	6 N. Y. Civ. Pro. 226.
1334	Hurd v. Hannibal & St. Joseph R. R. Co.	6 N. Y. Civ. Pro. 386.
1335	Goodwin v. Bunzl.....	6 N. Y. Civ. Pro. 226.
1337	Learned v. Tillotson.....	6 N. Y. Civ. Pro. 425.
1342	Lippincott v. Westray.....	6 N. Y. Civ. Pro. 74.
1352	White v. Rintoul.....	6 N. Y. Civ. Pro. 259.
1357	Harris v. Supervisors Niagara Co.....	33 Hun, 279.
1366	Ansonia Brass, &c. Co. v. Conner.....	6 N. Y. Civ. Pro. 173.
1370	Place v. Riley.....	32 Hun, 17.
1421-1425	Hayes v. Davidson.....	6 N. Y. Civ. Pro. 377.
1421-1425	Hein v. Davidson.....	96 N. Y. 175; 5 Civ. Pro. 391.
1498	Kent v. Popham.....	6 N. Y. Civ. Pro. 336.
1498	Keeler v. McNeirney.....	6 N. Y. Civ. Pro. 363.
1515	Henderson v. Scott.....	6 N. Y. Civ. Pro. 39.
1525	Carleton v. The Mayor, &c.....	50 Super. 182.
1531	Henderson v. Scott.....	6 N. Y. Civ. Pro. 39.
1539	Mapes v. Brown.....	14 Abb. N. C. 94.
1632	Kent v. Popham.....	6 N. Y. Civ. Pro. 336.
1695	Err v. Schroeder.....	6 N. Y. Civ. Pro. 253.
1695	American Tool Co. v. Smith.....	32 Hun, 121.
1699	Err v. Schroeder.....	6 N. Y. Civ. Pro. 253.
1708	People <i>ex rel.</i> Field v. Nat'l Pacific R.	
	R. Co.....	50 Super. 458.
1772, 1773	Ryer v. Ryer.....	33 Hun, 116.
1780	Toronto Trust Co. v. Chicago B. & Q.	
	R. R.....	32 Hun, 190.
1780	Brooks v. Mexican Constr. Co.....	50 Super. 287.
1782	Langdon v. Fogg.....	14 Abb. N. C. 436.
1809	Phoenix Foundry, &c. Co. v. North	
	River Construction Co.....	6 N. Y. Civ. Pro. 106.
1809	Woerishoffer v. North River Construc-	
	tion Co.....	6 N. Y. Civ. Pro. 113.
1809	Hewlett v. West Shore, &c. R. R.....	14 Abb. N. C. 328.

- 1810 Phoenix Foundry, &c. Co. v. North
River Construction Co. 6 N. Y. Civ. Pro. 106.
- 1810 U. S. Trust Co. v. N. Y., W. S. & B.
R'y Co. 6 N. Y. Civ. Pro. 90.
- 1810 Woerishoffer v. North River Construc-
tion Co. 6 N. Y. Civ. Pro. 113.
- 1810 *In re* Boynton Saw & File Co. 6 N. Y. Civ. Pro. 342.
- 1819 Estate of Collins. 6 N. Y. Civ. Pro. 85.
- 1825 Joel v. Ritterman. 2 Dem. 242.
- 1825-1827 Peyser v. Wendt. 2 Dem. 221.
- 1826 Peters v. Carr. 2 Dem. 22.
- 1826 Sippel v. Macklin. 2 Dem. 219.
- 1833 Smith v. Collamer. 2 Dem. 147.
- 1835, 1836 Miller v. Miller. 67 How. Pr. 135.
- 1835, 1836 Wilkinson v. Littlewood. 67 How. Pr. 474.
- 1865 Colligan v. McKernan. 2 Dem. 421.
- 1902 Thomas v. Utica & Black River R. R. Co. 6 N. Y. Civ. Pro. 353.
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- 1904 Boyd v. N. Y. C. & H. R. R. R. Co. 6 N. Y. Civ. Pro. 222.
- 1919 Duncan v. Jones. 32 Hun, 12.
- 1932 Garrison v. Garrison. 67 How. Pr. 271.
- 1948, *et seq.* Reis v. Rhode. 6 N. Y. Civ. Pro. 406.
- 1953 People *ex rel.* Deane v. Supervisors of
Greene. 14 Abb. N. C. 31.
- 1991 People *ex rel.* Herkimer & Mohawk R.
R. v. Assessors of Herkimer. 6 N. Y. Civ. Pro. 297.
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R. v. Assessors of Herkimer. 6 N. Y. Civ. Pro. 297.
- 2015, *et seq.* People *ex rel.* Hoyle v. Osborne. 6 N. Y. Civ. Pro. 299.
- 2015 *In re* Larson. 96 N. Y. 381.
- 2019 People *ex rel.* Hoyle v. Osborne. 6 N. Y. Civ. Pro. 299.
- 2058 *In re* Larson. 96 N. Y. 381.
- 2120-2122 People *ex rel.* North Tarrytown v.
Cobb. 14 Abb. N. C. 493.
- 2129 People *ex rel.* Herkimer & Mohawk R.
R. Co. v. Assessors of Herkimer. 6 N. Y. Civ. Pro. 297.
- 2141 People *ex rel.* Emmett v. Campbell. 50 Super. 91.
- 2269 Naylor v. Naylor. 32 Hun, 228.
- 2272 Naylor v. Naylor. 32 Hun, 228.
- 2284 Brett v. Brett. 33 Hun, 547.
- 2285 Stephenson v. Hanson. 6 N. Y. Civ. Pro. 43.
- 2286 Ryer v. Ryer. 33 Hun, 116.
- 2366 McNulty v. Solley. 95 N. Y. 242.
- 2419, *et seq.* *In re* E. M. Boynton Saw & File
Co. 6 N. Y. Civ. Pro. 342.

2432, <i>et seq.</i>	Pruden v. Tallman.....	6 N. Y. Civ. Pro. 360.
2432, <i>et seq.</i>	Holmes v. Stietz.....	6 N. Y. Civ. Pro. 362.
2433	Lippincott v. Westray.....	6 N. Y. Civ. Pro. 74.
2435	Seligman v. Wallach.....	6 N. Y. Civ. Pro. 232.
2436	Seligman v. Wallach.....	6 N. Y. Civ. Pro. 232.
2444	Holmes v. Stietz.....	6 N. Y. Civ. Pro. 362.
2464	Strohn v. Epstein.....	6 N. Y. Civ. Pro. 36.
2464	De Vivier v. Smith.....	6 N. Y. Civ. Pro. 394.
2472	Matter of Lynch.....	67 How. Pr. 436.
2472, subds. 3 and 6.	Jones v. Hooper.....	2 Dem. 14.
2476	Evans v. Schoonmaker.....	2 Dem. 249.
2476, subd. 3.	White v. Nelson.....	2 Dem. 265.
2481	Matter of Lynch.....	67 How. Pr. 436.
2481, subds. 5, 11.	Wolfe v. Lynch.....	2 Dem. 610.
2481, subd. 6.	Estate of Tilden.....	6 N. Y. Civ. Pro. 15.
2481, subd. 6.	Estate of Singer.....	6 N. Y. Civ. Pro. 389.
2481, subd. 6.	Crossman v. Crossman.....	2 Dem. 60.
2481, subd. 11.	Hoes v. Halsey.....	2 Dem. 577.
2484	People <i>ex rel.</i> Oakley v. Petty.....	32 Hun, 443.
2485	People <i>ex rel.</i> Oakley v. Petty.....	32 Hun, 443.
2486	Matter of Chauncey.....	32 Hun, 429.
2509, subd. 2	Mauran v. Hawley.....	2 Dem. 396.
2514, subds. 3, 11.	Creamer v. Waller.....	2 Dem. 351.
2517	Fountain v. Carter.....	2 Dem. 313.
2520	Mauran v. Hawley.....	2 Dem. 396.
2520	Matter of Carhart.....	2 Dem. 627.
2527	Estate of Tilden.....	6 N. Y. Civ. Pro. 15.
2527	Matter of Watson.....	2 Dem. 642.
2530	Matter of Watson.....	2 Dem. 642.
2533	Thompson v. Mott.....	2 Dem. 154.
2534	Moorhouse v. Hutchinson.....	2 Dem. 429.
2537	Matter of Moody.....	2 Dem. 624.
2545	Matter of Will of Smith.....	95 N. Y. 517.
2545	Dickel v. Yates.....	2 Dem. 229.
2545	Waldo v. Waldo.....	32 Hun, 251.
2545	Matter of Chauncey.....	32 Hun, 429.
2554	Joel v. Ritterman.....	2 Dem. 242.
2554	Bingham v. Burlingame.....	33 Hun, 211.
2557	Beekman v. Beekman.....	2 Dem. 635.
2558	Matter of Budlong.....	33 Hun, 235.
2587	Freeman v. Coit.....	96 N. Y. 63.
2593	Cuthbert v. Jacobson....	2 Dem. 134.
2597	Bick v. Murphy.....	2 Dem. 251.
2597	Stevens v. Stevens.....	2 Dem. 469.
2600	Shook v. Goddard.....	2 Dem. 201.

2600	Bick v. Murphy.....	2 Dem. 251.
2606	Murray v. Vanderpoel.....	2 Dem. 311.
2606	Maze v. Brown.....	2 Dem. 217.
2606	Bunnell v. Ranney.....	2 Dem. 327.
2606	Seofield v. Adrianee.....	2 Dem. 486.
2606	Matter of Latz.....	33 Hun, 618.
2611	Estate of Bogert.....	6 N. Y. Civ. Pro. 198.
2614	Crossman v. Croseman.....	2 Dem. 69.
2614	Crossman v. Crossman.....	95 N. Y. 145.
2615	<i>In re</i> Powers.....	6 N. Y. Civ. Pro. 326.
2615	Dyer v. Erving.....	2 Dem. 160.
2617	Dyer v. Erving.....	2 Dem. 160.
2617	Hammersley v. Lockman.....	2 Dem. 524.
2618	Estate of Bogert.....	6 N. Y. Civ. Pro. 198.
2618	Matter of Hoyt.....	67 How. Pr. 57.
2618	Conselyea v. Walker.....	2 Dem. 117.
2618	Hoyt v. Jackson.....	2 Dem. 443.
2618-2620	Graber v. Hoaz.....	2 Dem. 216.
2620	Rolla v. Wright.....	2 Dem. 482.
2621	Golligan v. McKernan.....	2 Dem. 421.
2623	Estate of Bogert.....	6 N. Y. Civ. Pro. 198.
2624	Tiers v. Tiers.....	2 Dem. 209.
2643	Matter of Allen.....	2 Dem. 203.
2647, et seq.	Matter of Will of Gouraud.....	95 N. Y. 256.
2647	Crossman v. Crossman.....	2 Dem. 69.
2647	Hoyt v. Jackson.....	2 Dem. 443.
2648	Fountain v. Carter.....	2 Dem. 313.
2661	Moorhouse v. Hutchinson.....	2 Dem. 429.
2668	Matter of Chase.....	32 Hun, 348.
2672	Kruse v. Fricke.....	2 Dem. 264.
2683	Berdell v. Schell.....	2 Dem. 292.
2685	Atkinson v. Striker.....	2 Dem. 361.
2685, subd. 2.	Hood v. Hood.....	2 Dem. 583.
2685, subd. 5.	Grubb v. Hamilton.....	2 Dem. 444.
2686	Moorhouse v. Hutchinson.....	2 Dem. 429.
2695	Hendrickson v. Ladd.....	2 Dem. 402.
2699	Evans v. Schoonmaker.....	2 Dem. 249.
2706	Mead v. Sommers.....	2 Dem. 296.
2706	Mauran v. Hawley.....	2 Dem. 396.
2706	Renk v. Herrman Lodge.....	2 Dem. 409.
2708	Mauran v. Hawley.....	2 Dem. 396.
2715	Creamer v. Waller.....	2 Dem. 351.
2717, subd. 2.	Atkinson v. Striker.....	2 Dem. 261.
2717-2719	Peyser v. Wendt.....	2 Dem. 221.
2718	Cuthbert v. Jacobson.....	2 Dem. 134.

2723	Estate of Collins.....	6 N. Y. Civ. Pro. 85.
2723	Estate of Stagg.....	6 N. Y. Civ. Pro. 88.
2723, subd. 1.	Peters v. Carr.....	2 Dem. 22.
2724	Cuthbert v. Jacobson.....	2 Dem. 134.
2726	Schlegel v. Winckel.....	2 Dem. 232.
2727	Schlegel v. Winckel.....	2 Dem. 232.
2729	Schlegel v. Winckel.....	2 Dem. 232.
2735	Cuthbert v. Jacobson.....	2 Dem. 134.
2736	Slosson v. Naylor.....	2 Dem. 257.
2736	Waters v. Faber.....	2 Dem. 290.
2739	Snyder v. Snyder.....	96 N. Y. 88; 5 Civ. Pro. 267.
2743	Estate of York.....	6 N. Y. Civ. Pro. 245.
2743	Gibbons v. Sheppard.....	2 Dem. 247.
2743	Tilden v. Dows.....	2 Dem. 489.
2746	Matter of Moody.....	2 Dem. 624.
2750	Estate of Le Baron.....	6 N. Y. Civ. Pro. 62.
2793, subd. 5.	Smith v. Meakin.....	2 Dem. 129.
2811	Slosson v. Naylor.....	2 Dem. 257.
2812, 2813	Gladding v. Follett.....	2 Dem. 58.
2832	Ledwith v. Union Trust Co.....	2 Dem. 439.
2838	Griffin v. Sarsfield.....	2 Dem. 4.
2842	Ledwith v. Union Trust Co.....	2 Dem. 439.
2845	Ledwith v. Union Trust Co.....	2 Dem. 439.
2846, 2847	Welch v. Gallagher.....	2 Dem. 40.
2847-2850	Smith v. Lusk.....	2 Dem. 595.
2851	Griffin v. Sarsfield.....	2 Dem. 4.
2876	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2894-2904	Stern v. Moss.....	6 N. Y. Civ. Pro. 182.
2901	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2902	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2916	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2917	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2920	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2925	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2933	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
2966	Livingston v. Morrissey.....	6 N. Y. Civ. Pro. 28.
3016	Allen v. Swan.....	6 N. Y. Civ. Pro. 56.
3044	Commissioners of Jamaica v. Allen.....	32 Hun, 61.
3044, 3045	People v. Norton.....	33 Hun, 277.
3046	Andrews v. Snyder.....	6 N. Y. Civ. Pro. 333.
3048	Andrews v. Snyder.....	6 N. Y. Civ. Pro. 333.
3049	Zabriskie v. Wilder.....	14 Abb. N. C. 325.
3063	Irr v. Schroeder.....	6 N. Y. Civ. Pro. 253.
3070	Allen v. Swan.....	6 N. Y. Civ. Pro. 56.
3174	Oakes v. Harway.....	6 N. Y. Civ. Pro. 357.

3191	Walsh v. Schulz.....	6 N. Y. Civ. Pro. 126.
3191	Willmore v. Flack.....	6 N. Y. Civ. Pro. 191.
3209, 3210, 3211	Stern v. Moss.....	6 N. Y. Civ. Pro. 182.
3245	Dressell v. City of Kingston.....	32 Hun, 526.
3246	Miller v. Miller.....	32 Hun, 491.
3246	McGovern v. McGovern.....	50 Super. 395.
3247	Remington Paper Co. v. O'Dougherty...	6 N. Y. Civ. Pro. 79.
3247	Slauson v. Watkins.....	95 N. Y. 369.
3251	Woodford v. Rasback.....	6 N. Y. Civ. Pro. 315.
3251	Woodford v. Chapman.....	6 N. Y. Civ. Pro. 315.
3251,	subd. 3 Studwell v. Baxter.....	33 Hun, 331.
3253	Rutty v. Person.....	6 N. Y. Civ. Pro. 25.
3253	Boyd v. N. Y. C. & H. R. R. Co....	6 N. Y. Civ. Pro. 224.
3268	Fitzsimmons v. Curley.....	6 N. Y. Civ. Pro. 156.
3268	Krom v. Kursheedt.....	6 N. Y. Civ. Pro. 371.
3269	Fitzsimmons v. Curley	6 N. Y. Civ. Pro. 156.
3271	McGovern v. McGovern.	50 Super. 393.
3278	Krom v. Kursheedt.....	6 N. Y. Civ. Pro. 371.
3297	Race v. Gilbert.....	32 Hun, 360.
3334	People v. City Bank....	96 N. Y. 32.
3343,	subd. 2 Maura v. Hawley.....	2 Dem. 396.
Ch. 18,	tit. 3, art. 5 Jones v. Hammersley....	2 Dem. 286.
Ch. 18,	tit. 3, art. 7 Hendrickson v. Ladd....	2 Dem. 402.
Ch. 18,	tit. 5 Hendrickson v. Ladd.....	2 Dem. 402.
Ch. 18,	tit. 5 Wolfe Lynch.....	2 Dem. 610.
Ch. 18,	tit. 6 Gladding v. Follett.....	2 Dem. 58.

CIVIL PROCEDURE REPORTS.

KNAPP, APPELLANT, v. SIMON, IMPLEADED, ETC.,
RESPONDENT.

COURT OF APPEALS, 1884.

§§ 382, 539-541.

Broker.—Effect of concealment by, of the name of his principal.—Rights and liabilities of.—Pleading.—When court of appeals will consider a case upon the cause of action disclosed by the evidence rather than on that set up in the pleadings.—Duty of court to give party benefit of cause of action established by the evidence notwithstanding insufficiency of pleadings.

*—Statute of limitations.—Application of,
to broker's contract.*

An agent who purchases property without disclosing the name of his principal to the vendor, at the time of the purchase, renders himself personally liable to the vendor for the purchase price,^[1, 4] and this is the only consequence of the omission.^[2] The vendor, upon discovering the name of the principal in the transaction, may also hold him responsible for the price of the property bought, provided he has not meanwhile in good faith paid such price to the agent, and the vendor may pursue either the agent or principal or both, until he recovers the contract price.^[3, 4]

When a broker purchases or sells property without disclosing to the respective principals in the transaction the name of the party for whom he acts, he becomes personally liable for the purchase price

Knapp v. Simon.

and is entitled to collect it from the vendee,^[5] who can relieve himself from liability to the broker by showing that he has paid the contract price to the original vendor or that he has been released for a good and valuable consideration by the broker.^[6] A cause of action having once accrued to the broker, and becoming vested in him, can be discharged only by payment or release.^[7]

Where a complaint did not, in terms, set forth all of the facts necessary to support a cause of action sustained by evidence admitted on the trial without objection, and no question was at any time raised as to the sufficiency of the complaint to sustain the cause of action proved,—*Held*, that the court of appeals, on appeal, would consider the case upon the cause of action disclosed by the evidence and disregard any objections to the sufficiency of the pleadings not made in the court below;^[8] that it was the duty of the court below in the absence of any objection to the sufficiency of the complaint to give the plaintiff the benefit of any cause of action established by the evidence and a refusal by it to direct the jury to find in accordance with the case made by such evidence would be error.^[9]

Where a broker purchased wheat for a certain firm without disclosing his principal, and subsequently, upon being sued by the vendor, paid the balance of the purchase price then unpaid, and thereafter brought an action to recover the same from his principals,—*Held*, that it was error for the court to charge the jury in such action that if “the plaintiff acted as principal and made a sale of this wheat to the defendants, the plaintiff cannot recover,” and the judgment should therefore be reversed;^[14] that the plaintiff’s liability could not be affected by the character in which the plaintiff acted in making the purchase of the wheat,^[10] and it was entirely immaterial that for certain purposes he might be regarded by certain parties as a principal in the transaction;^[11] that so far as the defendants were concerned he was a person who had incurred a liability for their benefit and from which it was their duty to relieve him;^[12] also *Held*, that the defendants were undoubtedly entitled to invoke the benefit of the statute of limitations as a bar to any cause of action he might have against them and this bar would enure to them in regard to any liability growing out of the original transaction irrespective of the character in which the plaintiff acted at the time;^[13] that the statute of limitation would have been equally a bar to any action brought by him with respect to the original transaction whether he claimed as vendor of the wheat or as a broker entitled to enforce the contract of sale as the trustee of an express trust.^[13]

(Decided June 10, 1884.)

Knapp v. Simon.

Appeal by plaintiff from a judgment and order of the general term of the N. Y. superior court, affirming a judgment of the trial term of the same court in favor of the defendant.

This action was brought by the plaintiff to recover \$6498.36, the value of certain wheat alleged to have been purchased of one Carlos Cobb for defendants by plaintiff as their broker, and for which Cobb had recovered a certain judgment against plaintiff, on the ground that he had failed to disclose to Cobb, the defendants as his principals, and the costs of defending the action in which the judgment was recovered.

The complaint alleges that the defendants were, during October, 1868, copartners in business, under the firm name of C. A. Steen & Co. ; that the plaintiff was a broker in grains ; that on October 23, 1868, the defendants requested the plaintiff, as their broker, to purchase of Carlos Cobb 3,026 $\frac{1}{10}$ % bushels of wheat for the sum (with towage) of \$5,054.95 ; that the plaintiff, as broker, did buy the wheat, which was delivered to defendants ; that the principal and interest of this sum on October 28, 1868, amounted to \$5425.40, on which day defendants paid \$1,688.32, leaving unpaid \$3,737.08, which defendants never paid ; that said Cobb sued the plaintiff for the unpaid balance in the N. Y. superior court, and on April 21, 1876, recovered a judgment against him for the sum of \$5,554.39, which was affirmed by the general term January 8, 1877, with \$106.50 costs, which last judgment was on appeal to the court of appeals affirmed December 22, 1877, with \$145.34 costs (see 42 *N. Y. Super. Ct.* [10 *J. & S.*] 91 ; 71 *N. Y.* 348), that said Cobb died pending the appeal, and Emmeline F. Cobb, his administratrix, was substituted as plaintiff in his place, and he was compelled to and did pay her the sum of \$6,498.36, the amount of the several judgments, no part of which has been

Knapp v. Simon.

repaid him; that said judgments were recovered against him, although the defendants in this action were the principals in the transaction, and the plaintiff a mere broker, under allegations and proof that plaintiff failed to disclose his principals.

Among other defenses set up by the defendant were allegations that the claim in suit had been released, and that it was barred by the Statute of Limitations.

On a first trial the defendant had a judgment in his favor, which the court of appeals, on appeal, reversed (86 *N. Y.* 311).

On the second trial the defendant was again successful and the general term affirmed the judgment entered by him.

From the judgment and order of affirmance entered on the decision of the general term this appeal was taken.

Further facts appear in the opinion.

D. M. Porter, for appellant.

The assumption and agreement to pay the debt of the plaintiff to Cobb at the time of the settlement between plaintiff and defendants . . . would make it a matter of indifference what the original transaction was, because, as between the plaintiff and defendants, he, plaintiff, became and was the surety and defendants the principals, although as to Cobb the plaintiff still remained a principal because Cobb was not a party to this agreement. *Slauson v. Watkins*, 86 *N. Y.* 597; *Comstock v. Drohan*, 71 *Id.* 9; S. C., 8 *Hun*, 373. . . . The law implies a request if the surety is compelled to pay. *Neass v. Mercer*, 15 *Barb.* 318; *Bradshaw v. Beard*, 12 *C. B. N. S.* 344; *Doty v. Wilson*, 14 *Johns.* 378; *Van Santen v. Standard Oil Co.*, 81 *N. Y.* 171; *Exall v. Partridge*, 8 *T. R.* 308; *Bailey v. Bussing*, 28 *Conn.* 455; *Norton v. Coons*, 3 *Denio*, 130; S. C., 6 *N. Y.* 33. . . . "In order to prevent injustice, the law

Knapp v. Simon.

will imply a promise to indemnify in favor of a surety if none is expressed." *Holmes v. Weed*, 19 *Barb.* 128 ; *Aspinwall v. Sacchi*, 57 *N. Y.* 331 (335, 336). . . . The suit is for money paid to the defendant's use under an agreement to relieve the plaintiff from all liability ; in other words the plaintiff paid the defendants a consideration to become principals to Cobb, as between the plaintiff and the defendants. And they did so by force of their assumption and agreement to pay the debt for which plaintiff was liable. *Williams v. Shelly*, 37 *N. Y.* 375 ; *Waddington v. Vredenburg*, 2 *Johns. Cas.* 327 ; *Morgan v. Smith*, 70 *N. Y.* 537 ; *Holmes v. Weed*, 19 *Barb.* 128 (135). The plaintiff and defendants (because of plaintiff's failure to disclose to Cobb, who were his principals), were both liable to Cobb, *Nason v. Cockroft*, 3 *Duer*, 366 ; *Coleman v. Bank of Elmira*, 53 *N. Y.* 388 (394) ; *Cobb v. Knapp*, 71 *Id.* 348 ; *Story on Agency*, § 266, 267 ; *Meeker v. Claghorn*, 44 *N. Y.* 349. . . . "A factor or other mercantile agent who contracts in his own name on behalf of his principal is a trustee of an express trust, and is the proper party to bring an action upon the contract." *Grinnel v. Schmidt*, 2 *Sandf.* 705, 706 ; *Ladd v. Arkell*, 37 *N. Y. Super. Ct.* (5 *J. & S.*) 35 (40) ; *Rowland v. Phalen*, 1 *Bosw.* 43 ; *Considerant v. Brisbane*, 22 *N. Y.* 289 ; *Davis v. Reynolds*, 48 *How. Pr. R.* 210 ; *aff'd*, 5 *Illn.* 651 ; *Morgan v. Reid*, 7 *Abb. Pr.* 215 ; *Brown v. Cherry*, 56 *Barb.* 685. . . . By the terms of the settlement, even if Knapp had sold the grain as principal he became surety when they promised to pay his liability to the third party from whom he bought. *Savage v. Putnam*, 32 *N. Y.* 501 ; *Morss v. Gleason*, 64 *Id.* 204 ; *Colgrove v. Tallman*, 67 *Id.* 95. . . . The charge of the court that : "If in this transaction the plaintiff acted as principal and made a sale of this wheat to the defendants the plaintiff cannot recover in the present action," which is excepted to, was erroneous. Because

Knapp v. Simon.

(1) there is no evidence that he acted as principal; but the evidence is uncontradicted that he acted as broker; (2) at the time of the alleged settlement the plaintiff took fifty cents on the dollar of an indebtedness of \$34,000, upon the consideration that Cobb's claim should be settled by the defendants; and even if he had been principal, he, upon such agreement, as between the parties to this action, became surety. *Savage v. Putnam*, 32 *N. Y.* 501; *Morss v. Gleason* 64 *Id.* 204; *Colgrove v. Tallman*, 67 *Id.* 95. The case was tried without reference to the pleadings, and the question cannot be raised upon appeal that the plaintiff did not sue for money paid to the defendant's use, the evidence clearly establishing that he did sue for money paid as surety to the defendant's use. *Cowing v. Altman*, 79 *N. Y.* 167; *McKechnie v. Ward*, 58 *Id.* 541, (542); *McGoldrick v. Willits*, 52 *Id.* 612; *Drake v. Kimball*, 5 *Sandf.* 237. The complaint that plaintiff paid as surety, was good, under the common law count for money paid to the defendant's use. . . . *Chitty's Precedents on Pleading* (3d Ed.) 33; *Bullen & Leakes' Precedents*, p. 34; *Chitty's Treatise on Pleadings* (16th Am. Ed.), 33. "An instruction which assumes the existence of facts of which there is no evidence is misleading and erroneous." *Jones v. Randolph*, 14 *Otto (U. S.)* 108. And there being no evidence from which such a presumption could be drawn it was error to submit the question to the jury. *Algur v. Gardner*, 54 *N. Y.* 360. "The submission by the judge to the jury of an hypothesis wholly unwarranted by the evidence, is error for which a new trial will be awarded." *Storey v. Brennan*, 15 *N. Y.* 524; *Harris v. Wilson*, 1 *Weed.* 511; *Losee v. Buchanan*, 61 *Barb.* 86 (99); *Gale v. Wells*, 12 *Barb.* 84 (94). General evidence has no weight where the facts are proved showing precisely what was done. *Steel v. Benham*, 84 *N. Y.* 634, 640; *Miller v. Long Island R. R. Co.*, 71 *Id.* 380. "Where

Knapp v. Simon.

in submitting a cause to a jury the judge instructed them that they may find a verdict for the defendant upon either of two distinct grounds, and the charge upon one of the questions is erroneous in point of law, a verdict for the defendant will be set aside, as for aught appearing it may be based on untenable grounds." *Sayre v. Townsend*, 15 *Wend.* 647; *Rogers v. Murray*, 3 *Bosw.* 357; *Weber v. Kingsland*, 8 *Id.* 415 (416); *Green v. Hudson Riv. R. R. Co.*, 32 *Barb.* 25.

A. J. Vanderpoel and *H. W. Bookstaver* (*Vanderpoel, Green & Cuming*, attorneys), for respondent.

The court properly directed a verdict for the defendant Simon. The plaintiff and defendant, by moving the court to direct a verdict each in his favor, conceded that there was no question of fact to be considered by the jury, and that the case presented only questions of law to be determined by the court. *Winchell v. Hicks*, 18 *N. Y.* 565; *O'Neill v. James*, 43 *Id.* 84; *First Nat'l Bank, etc. v. Dana*, 79 *Id.* 108. . . . Plaintiff's right to recover in this action does not depend on the recovery of judgment in Cobb against Knapp, but upon the terms and conditions of the purchase and sale of the wheat made by Knapp on October 23, 1868. No new terms were made after that time. Cobb recovered of Knapp, because in making the purchase of him he failed to state the fact that he was acting as a broker merely, and chose to deal with Cobb as principal. His position as principal was fixed by the agreement of October 23, 1868. *Cobb v. Knapp*, 42 *N. Y. Super. Ct.* (10 *J. & S.*) 91; *rev'd* 71 *N. Y.* 348.

RUGER, Ch. J.—In 1868 the plaintiff, being a grain broker, purchased of one Carlos Cobb, for and at the request of the defendants, the firm of C. A. Steen & Co., a quantity of wheat, for cash on delivery. The plaintiff did not disclose the names of his principals

Knapp v. Simon.

upon making such purchase. The grain was delivered and has never been paid for by the defendants.

The effect of a purchase of property by an agent ['] who does not disclose the name of his principal to the vendor at the time of such purchase, is to render the agent personally liable to the vendor for the purchase price.

The agent is under no legal or moral obligation ['] to make such disclosure, and the only consequence of an omission is to create a liability which he might escape by informing the vendor of the circumstance of his agency and the name of his principal.

The vendor may, however, upon discovering the name of the principal in the transaction, also hold him responsible for the price of the property bought, provided he has not in the meanwhile in good faith ['] paid such price to the agent. He may therefore pursue either the agent or the principal, or both, until he recovers the contract price. *Cobb v. Knapp*, 71 N. Y. 348.

It appears in evidence in this case that Cobb did, in 1868, bring an action against the principals for the price of such wheat, but was induced soon after to discontinue it.

The debt to Cobb not having been paid, in 1873, he brought an action therefor against the plaintiff, which resulted in his obtaining a judgment for the balance of the price of the wheat remaining unpaid.

Knapp was there held liable upon the ground ['] that by reason of the non-disclosure of the name of his principal he became personally liable for the purchase price of the property bought, and it was further held that he was not discharged from such liability by reason of the action brought by Cobb against the defendants for the same cause of action. *Cobb v. Knapp (supra)*. The judgment thus recovered, the

Knapp v. Simon.

plaintiff was compelled to pay, and he now seeks to recover back the money paid by him.

When a broker purchases or sells property without disclosing to the respective principals in the transaction the name of the party for whom he acts, he becomes, on the one side, liable personally for the [6] purchase price of the property bought, and, on the other, is entitled to collect such price from the principal at whose instance a purchase was made.

The vendee in such a case can relieve himself [7] from liability to the broker only by showing payment of the contract price by him to the original vendor or a release for a good or valuable consideration from the broker.

A cause of action having once accrued to the [8] broker, and becoming vested in him, can be discharged only by payment or release. *Seymour v. Minturn*, 17 *Johns.* 170.

The evidence shows that about the time of this purchase, the plaintiff brought an action against the defendants to recover upon a general balance of account, which included the purchase price for the wheat in question. That suit never proceeded to judgment, but was settled by the parties, the claim now made being expressly excepted from the operation of such settlement, the defendants then agreeing, as part consideration therefor, to pay and discharge the liability to Cobb.

That action, therefore, did not change the original relations of the parties, except as they were affected by the express agreement of the defendants to assume and pay the Cobb claim, and it left the defendants still liable to the plaintiff in some form of action for the payment of the price of the wheat.

As already stated, Cobb, about the same time, having discovered the names of the principals for whom ~~the~~ plaintiff acted in the purchase of the wheat, sued

Knapp v. Simon.

them to recover its price. This action never proceeded to judgment, but was procured to be discontinued by an arrangement made between Ulrich Simon, one of the defendants, and Cobb, whereby Cobb agreed to discontinue it and release Simon individually from the claim, upon payment by him of one-third of the price of such wheat. This agreement was performed by Simon, and he paid to Cobb the amount agreed upon, and received from him a release of his individual liability in accordance with the provisions of the joint debtors' act. It is claimed by the defendant, Simon, that the plaintiff was present at the time of this agreement, knew its terms and conditions, and assented thereto. This fact, although controverted by the plaintiff herein, must, in the consideration of the case, under the findings of the jury, be assumed by us to be true.

It is claimed by the defendant, Simon, that this fact in some way operates as a discharge of him from his liability to the plaintiff.

There was practically no conflict in the evidence, and it cannot be successfully disputed that an agreement was made upon the settlement of the former action between the present parties, whereby the defendants were to assume the payment of the debt owing to Cobb, and were to relieve the plaintiff from his liability therefor. This agreement was made upon a valid consideration, viz., the discontinuance of the action and the release by the plaintiff to the defendants of a valid claim for a large amount, and it rendered the defendants liable to the plaintiff for any damages which he might incur by reason of their breach of the agreement.

It would seem, therefore, that the plaintiff has held two causes of action against the defendants, viz., one upon the original contract for the purchase price of the wheat, and secondly, that arising out of a breach

Knapp v. Simon.

of defendants' undertaking to shield him from liability to Cobb on account of such purchase.

If the first cause of action was not merged in the agreement out of which the second arose, it would probably now be barred by the Statute of Limitations, without regard to the character in which the plaintiff acted in making the purchase, whether as principal or broker.

It would seem therefore, when the case was submitted, that the evidence disclosed a good cause of action in favor of the plaintiff, by reason of the failure of the defendants to relieve the plaintiff from his liability to Cobb, and entitled him to recover in this action upon the proof that he had been compelled to pay Cobb for the balance due on the purchase price of the wheat, unless Simon was discharged by reason of the circumstances attending the release given to him by Cobb.

It is true that the complaint in the case does not in terms set forth all of the facts necessary to support the second cause of action above referred to, but on the trial the evidence supporting it was admitted without objection, and no question was at any time raised as to the sufficiency of the complaint to sustain the cause of action proved.

Under the circumstances, this court on appeal will consider the case upon the cause of action disclosed by the evidence, and disregard any objections to the sufficiency of the pleadings which were not made [*] in the court below (*Southwick v. First Nat'l Bank*, 84 N. Y. 420; *Cowing v. Altman*, 79 *Id.* 167).

It was also the duty of the court below, in the absence of objections to the sufficiency of the complaint, to give the plaintiff the benefit of any cause of [*] action established by the evidence,* and a refusal

* See Code of Civil Procedure, §§ 539-541.

Knapp v. Simon.

by it to direct the jury to find in accordance with the case made by such evidence would be error (McGoldrick v. Willits, 52 N. Y. 612.)

Upon a former appeal in this case, reported in 86 N. Y. 311, this court reversed a judgment in favor of the defendants, upon the ground that the court on the trial erred in assuming as matter of law, that the presence of Knapp at the settlement of the action brought by Cobb against the defendants, and his assent to the release then given by Cobb to the defendant Simon, operated as a discharge of Simon from his liability to the plaintiff.

It was held upon the evidence as it there appeared, that the fact of such assent was a controverted fact, and the court erred in taking the question from the jury against the objection of the plaintiff. The case does not assume to decide what would be the effect of an assent by the plaintiff to the execution of the release, in case such assent was established by the evidence. It seems to have been retried upon the theory that that question had been decided by this court upon the former appeal, and no question seems to have been made on the retrial as to the legal effect of such an assent.

Inasmuch as the question was not raised upon the trial below, and has not been argued here, we do not now feel called to express an opinion upon the point. Aside from an exception to the admission of evidence, but one question is presented upon this appeal for our consideration, and that arises over the exception taken by the plaintiff to a portion of the charge.

The court, by its instructions, left to the jury but two questions for their consideration, and those, as stated in the language of the court, were as follows: 1st. "If in this transaction the plaintiff acted as principal and made a sale of this wheat to the defendants, the plaintiff cannot recover in the present action. If

Knapp v. Simon.

on the other hand, he simply acted as broker in the transaction, then you have a further question to consider, and that is in respect to this release." 2d. "If the plaintiff was present or acquiesced in the agreement by which Mr. Simon was released, then the defendant is not liable."

No exception was taken by the plaintiff to the latter portion of the charge, but with respect to the first proposition stated, an exception was properly taken. We do not see how the defendants' liability can be affected by the character in which the [10] plaintiff acted in making the purchase of the wheat. He was, upon the evidence in the case entitled to recover the amount he had been compelled to pay Cobb, unless the circumstances attending the release of Simon by Cobb operated as a discharge of Simon's liability to him. The defendants were always primarily liable for the purchase price of the wheat as between them and the plaintiff.

The facts, in respect to the character in which Knapp acted, in the transaction in question, are practically undisputed. The defendants, knowing that he was a broker, applied to him to purchase the wheat for them as a broker. They paid him commissions as a broker, and knew and dealt with him in no other character. It is entirely immaterial that for certain purposes he may be regarded by certain parties [11] as a principal in the transaction. He was, so far as the defendants are concerned, a person who had incurred a liability for their benefit, and from which it was their duty to relieve him. They were undoubtedly entitled to invoke the benefit of the Statute of Limitations as a bar to any cause of action which [12] he might have against them, and this bar would enure to them in regard to any liability growing out of the original transaction, irrespective of the character in which the plaintiff acted at that time.

Knapp v. Simon.

If he acted as a broker in the transaction, but contracted in his own name, assuming the responsibilities of a principal, his rights and liabilities would be the same, and no other, than those which would have attended the transaction, if his real character had been entirely undisclosed.

The Statute of Limitations would have been [13] equally a bar to any action brought by him with respect to the original transaction, whether he had claimed as the vendor of the wheat or as a broker entitled to enforce the contract of sale as the trustee of an express trust. *Considerant v. Brisbane*, 22 N. Y. 389.

We think, therefore, when the court instructed [14] the jury that the plaintiff's right to recover in this action depended upon the fact as to whether he acted as a principal or as a broker in respect to the purchase of the wheat, the charge was erroneous.

Having arrived at the conclusion that the judgment should be reversed for this reason, we deem it unnecessary to discuss the other questions in the case.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Estate of Tilden.

ESTATE OF WILLIAM TILDEN, DECEASED.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1884.

§§ 2481, subd. 6, 2527.

Power of surrogate and of supreme court to open, vacate or set aside accounting of executors.—Irregular service of citation.—Appointment of guardian ad litem in surrogate's court.—Effect of agreement between heirs on liability of executor.

The surrogate has authority to open, vacate or set aside a decree made on the final accounting of executors, and on appeal from an order denying a motion for such relief, the general term of the supreme court has the same power and must review the determination of the surrogate, as if an original application was made to it.^[1]

Prior to the passage of the law conferring upon surrogates the authority to appoint special guardians on the accounting of executors, &c., they possessed inherent authority to appoint guardians *ad litem* to look after and protect the interest of next of kin not appearing who were under the age of 21 years, and the fact that no statute existed requiring the exercise of this authority did not justify the omission to make such an appointment.^[2]

Where citations to attend the accounting of executors were served upon an infant interested in the estate and his testamentary guardian, who were absent from the country, irregularly for want of time, and they did not appear, and the infant was not represented on the accounting and no guardian *ad litem* was appointed for him,—*Held*, that so far as it affected the interests of the petitioner, the hearing, which resulted in the decree following the first accounting was clearly irregular and permitted the applicant to disaffirm its authority and apply for its reconsideration after he attained the age of 21 years.^[3, 4]

Where an infant legatee was charged in the accounts of the executors with "one fourth of the general expenses abroad, &c., and for house expenses, &c.," of his mother, with whom he resided, and the amount so paid for his support, education and use during minority, averaged about \$7,705 per year, and it appeared that the guardians appointed to represent him on the accounting were of no service to the rights and interests of their ward and apparently

Estate of Tilden.

made no effort to investigate the propriety of any of the charges made against him, and that after he attained his majority and received information of the actual state of the accounts he applied with reasonable diligence to open the accountings and for liberty to contest them,—*Held*, that his application should be granted;[⁵, ⁶, ⁷, ⁸] that answers to the complaints and objections of the petitioner should not be specially considered on the application, for that could not satisfactorily be done on *ex parte* allegations or affidavits made in support of or to resist such a proceeding,[⁹] that the law has prescribed a different mode of investigation by allowing the party whose interests are affected by the charges, upon evidence taken in the usual way, to contest their legality, and propriety and that as the applicant was supplied with no adequate opportunity for doing so during minority, the privilege should still be accorded him.[⁹]

Where a will gives the executors liberty to pay over the rents, income and profits of an infant's share in the estate directly to his mother, who was his testamentary guardian, for his support, education and comfort, and they did not do so, but merely allowed charges made by her against the infant, taking her receipts practically as their authority therefor,—*Held*, that the receipts would have no such force or weight as to preclude the infant from contesting such charges.[¹⁰]

Executors are not relieved from liability in their management and disposition of the personal estate of their testator by any agreement between the devisees, fixing and determining the rights of each and releasing several from claims for over-advances by the executors, or by anything done thereunder.[¹¹]

(*Decided March 7, 1884.*)

Appeal from an order of the surrogate of New York county, denying petition of Beverly B. Tilden, that the decrees made upon four several accountings of the executors of William Tilden deceased be opened and for a rehearing thereof so far as they affect his rights.

The facts appear from the opinion.

William J. Macfarlane, for appellant.

Charles E. Tracy (*D. H. Olmstead*, attorney), for respondents.

DANIELS, J.—The testator, William Tilden, died on the 26th day of June, 1869, leaving a large real and

Estate of Tilden.

personal estate to be disposed of according to his will and codicils. They were admitted to probate by the surrogate of the county of New York on or about the 19th of July, 1869, and letters testamentary were issued to four persons named in the will as executors. Another person was added as executor early in the year 1870, and a change was afterwards made in that year by substituting one other person in place of one of the original executors who had died, and a similar change was made as to another in 1877. At the time of the decease of the testator the petitioner was near the age of eleven years, he having attained his majority on or about the 10th of December, 1880. During his minority, four accountings were held by the executors of the estate. The first in February, 1872, the second in the summer of 1874, the third in the spring of 1877 and the fourth in the spring of 1880.

The petitioner claimed, in support of his application, that improper charges had been made and allowed against him on each of these accountings. He also claimed that the executors had failed to enforce the guarantee of William Tilden Blodgett of second mortgages received by them in partial settlement of a large indebtedness in favor of the estate against him. If he was probably right in the complaints made by him, ample authority was given by subdivision 6 of section 2481 of the Code of Civil Procedure, to the surrogate to open, vacate or set aside the decree, so far as that might be necessary for the further examination of the items to which the application was

['] directed, and upon appeal from the determination of the surrogate, the general term of the supreme court has the same power as the surrogate; and his determination must be reviewed as if an original application was made to that term. Under this authority the entire controversy presented by the petition and the answer to it, is to be considered upon the appeal

Estate of Tilden.

in the same manner in which the surrogate himself had the authority to consider it. In partial support of the allegations made, it was alleged and shown that no special guardian, or guardian *ad litem*, was appointed by the surrogate, to take charge of the interests of the petitioner on the first accounting. His mother had been appointed by the testator's will his testamentary guardian, but they were in Germany ['] when the citation was issued on the application of the executors, and it was served probably irregularly, at least, for want of time (3 R. S. 6th ed. 102, § 76), upon himself and his mother in that country. Neither she nor any other party in any form appeared for him on the accounting to investigate or protect his interests. On the second accounting it is recited in the decree that a special guardian for this purpose was appointed by the surrogate, and a similar statement is contained in the decree on the third accounting, and on the fourth a guardian was appointed on the petition of the appellant himself. But it is alleged in his behalf that neither of these persons undertook or made any special investion of his interests.

And as to the guardians on the second and third of the accountings, there seems to be good reason to believe that these charges of inattention made by him are well founded. Upon the fourth accounting the guardian has sworn that he did inform himself of all the facts bearing on the interest of the infant, for the period included in such accounting, from every source which seemed to him to be available. But that he resisted any of the charges made against his ward in the accounts has not been stated by him. Neither does the case made in his behalf, or in behalf of the executors, show that any special investigation took place at any time before the surrogate relative to the charges now complained of as improperly allowed to

Estate of Tilden.

the executors. It has been urged, as chapter 156 of the laws of 1874 specially conferred upon surrogates the authority to appoint special guardians on the accountings of executors, &c., that he had no power to make such appointment at the time of the first accounting of the executors. But in this position the executors do not appear to be sustained by authority. For before the enactment of this statute, it was practically held that the surrogate possessed the inherent authority arising out of the necessities of the situation, and the object to be attained by means of an accounting, to appoint a guardian *ad litem* to look after and protect the interest of the next of kin not appearing, who should be under the age of twenty-one years (*Kellett v. Rathbun*, 4 *Paige*, 102). The fact that no statute existed requiring the exercise of this authority did not therefore justify the omission to make such an appointment. The hearing, so far as it affected the interests of the petitioner, which [3] resulted in the decree following the first accounting, was clearly irregular, and permitted the applicant to disaffirm its authority and apply for its reconsideration after he attained the age of twenty-one years. *Dayton on Surrogates*, 3d ed. 506-7.

The first accounting extended over a period of two years and about four months, and it included a general charge amounting to the sum of \$13,880.58, for one-fourth of the general expenses abroad, &c., and for [4] house expenses, &c., to date, which was the 1st of October, 1871. This was a large amount for the support, maintenance and education of the petitioner, who was then a boy of about eleven or twelve years of age, and the propriety of its investigation would seem to be suggested by its extent and the statement of it which was given. Other charges of a similar general nature were contained in the account settled on the other accountings, amounting in the aggregate to up-

Estate of Tilden.

wards of \$27,000. Neither of those charges seem to have been challenged or resisted by either one of the guardians appointed to represent the petitioner on the second, third or fourth accountings, but they were wholly accepted and passed as they were contained in the executors' accounts. And by means of these and other charges extending to about the 29th of June, 1881, the sum of \$84,757.15 was in the aggregate charged to have been advanced for the support, education and use of the petitioner. The amounts appropriated to this purpose during the period of his minority was on an average of about \$7,705 each year. It may be that these charges were very properly made and that the executors discreetly and judiciously exercised the authority with which they had been invested by the testator. But inasmuch as they were in no manner made the subject of contest or investigation on behalf of the petitioner in the accountings which took place, a case was presented in which it would seem to be proper, after the attainment by him of the age of twenty-one years, to allow him to contest the propriety of these charges. In the second and third accountings the appointment of the guardians seem to have been regarded as so entirely unimportant as to have constituted only a formal compliance with what the law had required in that respect.

The guardians were of no service whatever to the rights and interest of their ward, and apparently made no effort to investigate the propriety of any of the charges against him, although the duty to do so was significantly suggested by the large as well as very general charges against him contained in the accounts. For on December 31, 1872, he was charged \$5,441.88 for his share of the household expenses to date. On May 1, 1873, a like charge of \$2,800.99 was made. On December 31 of the same year another of \$2,048.40, and on December 31, 1874, a like charge of

Estate of Tilden.

\$4,803.24, during most of which period it is stated as a matter of fact that the petitioner was absent from home attending boarding school. The last item in the third accounting was equally as suggestive in the same respect, for instead of charging the petitioner with expenses paid out on his behalf, the joint expenses of himself and another was evidently divided, and in the division the sum of \$7,050.60 was charged as his half, and very much the same seems to have been the course of proceeding as to the charges in the fourth accounting. The same propriety, therefore, manifestly exists for favorably considering his application for liberty to contest the items forming the subject of complaint on his part on each of these accountings. As he has applied with reasonable diligence for liberty to make such contest after he attained his full age and received information of the actual state of the accounts, the application was entitled to a liberal degree of consideration. And the same observation is pertinent to [8] the alleged failure of the executors to enforce the guarantees of the second mortgages assigned to them by William T. Blodgett.

As to some of the charges affected by the complaint of the petitioner, it is alleged that the facts indicating them to be correct were within the knowledge of the executors. This complaint more especially relates to expenditures charging him with one-fourth of the household expenses after the return of the family from Europe, and to at least one item of \$2,000 stated to have been paid to his mother for his board when he was away at school, and did not board with her for any portion of the time. The executors have asserted the correctness of these charges on the ground that the household was maintained in part by his mother as a home for the petitioner. They have also insisted that they are entitled to the allowance of the charges sustained by these several decrees, for the reason that the

Estate of Tilden.

petitioner's mother, as testamentary guardian, made and delivered receipts including these charges to the executors. But whether these grounds shall constitute satisfactory answers to the complaints and objections presented in behalf of the petitioner should not now be specially considered, for that cannot be done satisfactorily upon the *ex parte* allegations or affidavits made in support of or to resist such a proceeding. For

their adjustment the law has prescribed a different [°] mode of investigation, and that is by allowing the party whose interests are affected by the charges, upon evidence taken in the usual way to contest their legality and propriety, and as the applicant was supplied with no adequate opportunity for doing so during his minority, that privilege under the authorities should still be accorded to him. *Dayton on Surrogates*, 3d ed. 506-7, 543.

The application has been further resisted under the latter clause of 12th paragraph of the will, by which the executors were at liberty to pay over the rents, income and profits of the infant's one-fourth of the estate directly to the widow, to be laid out and expended [°] in her discretion for his support, education and comfort. But this authority was not exercised by the executors. They did not pay these rents, income and profits to her under this clause of the will, but they merely allowed the charges made against the petitioner, taking her receipts practically as their authority for these charges. And if they did that, as it has been alleged they did with good reason to believe that the charges themselves were to a large degree unfounded and improper, the receipts should have no such force or weight as to preclude the petitioner from still contesting the items to which he has specially objected. He may be unable to maintain the propriety of either of the objections urged in his behalf, but it is due to himself and also to the executors, who are

Estate of Tilden.

men of high character, that an investigation should take place concerning the propriety of these objections. If they are not well founded, then the executors should not be subjected to the imputations which have been made, but they should be vindicated by the action of the proper authorities. While if they are well founded, the rights of the applicant can in no other manner be ascertained than by making a like investigation.

After the petitioner had attained the age of twenty-one years, an agreement was entered into between himself and his three older brothers for the settlement of their rights and interests in the testator's real estate, and its division between them.

The two older brothers had received very much larger amounts from the testator's estate than the two brothers who were minors at the death of the testator, and the purpose of this agreement was to secure a division of the real estate upon the basis of the rights of the brothers under the will and codicils, and the proper adjustment of the amounts between themselves, which had been received by the oldest brothers. This agreement was carried into effect; the real estate was divided, and the amounts due from the older brothers to the younger ascertained and adjusted. And because of the making of this agreement and the action of the parties under it, it has been objected that the petitioner was after that disabled from questioning the accuracy of the accountings to which his complaints have now been directed. But the executors were not parties to this agreement. It was made wholly and exclusively by and between the brothers for a determination and settlement of their rights between themselves and it in no manner relieved the executors from liability in their management and disposition of the personal estate of the testator. If the applicant had valid claims against them which had neither been admitted or allowed, neither this agreement nor any-

Estate of Tilden.

thing which took place under it released them from that liability, or precluded him from asserting and enforcing their existence against the executors. It was no part of the intention of the agreement entered into to relieve them in any respect from any liability arising out of their management and administration of the personal estate, and all that afterwards took place between the parties to it was simply by way of performing its stipulations and carrying them into effect.

As the case has been presented a reasonable right has been maintained to the success of the application. It may in the end result in no advantage whatever to the applicant, but if it does not the executors are entitled to have that known and ascertained for their own proper vindication. But if the charges made shall be sustained then the applicant is equally and as justly entitled to the benefits which may be secured to him in that manner.

Other points than those which have been considered have been presented in favor of the applicant and also of the executors, but in the view which has been taken of those already considered, these do not require to be discussed or determined. For without them there is sufficient in the case to require the order from which the appeal has been taken to be reversed and an order entered directing the four decrees to be so far set aside and vacated as to allow the charges drawn in controversy by the applicant to be made the subject of future investigation.

The order should be reversed and such an order entered, with the usual costs and disbursements.

BEADY, J., concurred.

Rutty v. Person.

RUTTY v. PERSON, ET AL.

N. Y. SUPERIOR COURT, SPECIAL TERM, MAY, 1884.

§ 3253.

Allowance.—What is sufficient monetary basis for.

Where, in an action to open accounts, there was nothing to show the amount involved, except the statement of the plaintiff's counsel in opening the case, that if he succeeded he expected to show that the plaintiff was entitled to from \$50,000 to \$60,000, and the defendants succeeded in the action :—*Held*, that an extra allowance should be granted them.

(Decided May 24, 1884.)

Motion by defendant for an extra allowance.

This was an action to open accounts on the ground of fraud. In his opening address plaintiff's counsel stated that if he succeeded in opening the accounts he expected to show that from \$50,000 to \$60,000 was due plaintiff. There was nothing else to show the amount involved. The action was referred, and the referee reported in favor of defendants. Defendants then moved for an extra allowance.

Stephen P. Nash (*Kobbé Brothers*, attorneys), for the motion.

Plaintiff's statement in his opening address affords a sufficient monetary basis for an extra allowance.

Eugene H. Pomeroy & John E. Eustis, opposed.

FREEDMAN, J.—Allowance of \$500 granted.

Sprague v. Parsons.

SPRAGUE v. PARSONS, ET AL.

N. Y. COMMON PLEAS, SPECIAL TERM, MAY, 1884.

§§ 481, 640.

Void or irregular attachment.—Action for damages for.—Pleading.

It is not necessary to aver malice or want of probable cause in suing for damages sustained by the levying of a void or irregular attachment, and it cannot be held in the absence of such allegations, that plaintiff's remedy is confined to the undertaking given to procure the attachment.

An action may be maintained if the attachment be irregular only, on proof that it has been set aside ; but an allegation that the attachment was "illegal, unauthorized and void," being a conclusion of law, is not sufficient to admit proof that the attachment was void. (*Decided May 15, 1884.*)

Demurrer to complaint.

Action for damages sustained by the issuing of a void attachment and levy thereunto by the sheriff in an action, in the supreme court, by these defendants as plaintiffs against this plaintiff and others as defendants, to charge them with liability for the debt of the McKillop & Sprague Company, of which it was claimed that such defendants were trustees. The complaint alleges the above matters, and that the attachment was vacated and set aside in said action, and alleged damages, etc. Defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action. He urges that there can be no action except for malicious prosecution, and that in the absence of malice an action can only be maintained on the undertaking given to procure the attachment.

Sprague v. Parsons.

W. Z. Larned, for plaintiff.

Gilbert R. Hawes, for defendants.

J. F. DALY, J.—The complaint is sufficient. There is no need to aver malice or want of probable cause in suing for damages sustained by the levying of a void or irregular attachment. A process being void, the party who sets it in motion and all who aid him are trespassers. *Kerr v. Mount*, 28 *N. Y.* 659; *Wehle v. Butler*, 61 *Id.* 245; *Day v. Bach*, 87 *Id.* 56; see also in this court, *Wehle v. Haviland*, 42 *How. Pr.* 399; *S. C.*, 4 *Daly*, 550.

The action may be maintained if the process be irregular only, on proof that it has been set aside. The complaint avers that fact, and is sufficient in such an action. But the rule of damages may be different in such a case from the rule in case of an absolutely void attachment (*Day v. Bach*, above). The complaint here is not good as a pleading in an action of the latter class. The allegation that the attachment was "illegal, unauthorized and void," is a statement not of fact, but of a conclusion of law (*Hammond v. Earle*, 58 *How. Pr.* 437-8). The plaintiff will have to amend if he desires to prove on the trial that the attachment was void. But as a complaint in an action upon an attachment voidable for irregularity, the complaint is good because it avers that the attachment has been vacated.

The demurrer is therefore overruled, with costs. Leave to defendant to answer on payment of costs.

Livingston v. Morrissey.

LIVINGSTON, RESPONDENT, v. MORRISSEY,
APPELLANT.

COUNTY COURT, ONONDAGA COUNTY, MARCH, 1884.

§ 2966.

Justice's court.—Depositions taken on adjourning case.

In an action in a justice's court, testimony taken under section 2966 of the Code before trial will not warrant or sustain a judgment unless it is offered and read in evidence.

(Decided July 17, 1884.)

Appeal from a judgment rendered by a justice of the peace.

This action was brought to recover on contract, before a justice of the peace in the city of Syracuse. On December 24, 1883, the return day named in the summons, both parties appeared before the justice; the defendant answered, and asked for an adjournment for two weeks. The plaintiff being a non-resident of the country asked that her deposition and that of a witness who appeared in her behalf be taken under section 2966 of the Code of Civil Procedure. The justice granted the adjournment upon condition that the defendant file an undertaking; ordered such depositions to be taken, and adjourned the case two days. On December 26, both parties appeared before the justice, the defendant filed the required undertaking and the depositions were taken. The defendant objected to the taking of the plaintiff's deposition on the ground that the statute did not permit the plaintiff to have her deposition taken at her own instance, but his objection was overruled, and her deposition was taken. The justice passed upon objections taken by counsel

Livingston v. Morrissey.

to questions asked on both the direct and cross examinations.

The justice's term of office subsequently expired, and the case was tried before another justice, January 7, 1884, who gave judgment in favor of the plaintiff for \$41 damages and \$6.92 costs. The only evidence offered on the trial was that of one Barney H. Demarest taken under a commisson, and his evidence was insufficient to warrant the judgment. The depositions taken on the adjournment were neither read nor offered in evidence and the defendant did not put in any evidence but rested upon his motion for a non-suit.

The plaintiff contended that the justice could consider the depositions taken before trial without the same being read or offered in evidence.

William M. Morrissey and *P. W. Hogan*, for appellant.

The justice before whom the depositions of the plaintiff and her witness were taken, had no right to rule upon questions of evidence. See *Hewlett v. Wood*, 67 N. Y. 399. The justice erred in considering the depositions without the same being offered and read in evidence.

William P. Gannon, for repondent.

NORTHRUP, J.—Judgment reversed.

Frist v. Climn.

FRIST ET AL, v. CLIMM.

CITY COURT OF NEW YORK, SPECIAL TERM, JULY.
1884.

§§ 523, 529.

Verification to answer.--When may be omitted.

Where a complaint set out a sale of goods by plaintiff to defendant induced by the alleged false and fraudulent representation of the defendant and asked judgment for the contract price:—*Held*, that the defendant had a right to serve an unverified answer.

Section 529 of the Code,—which provides that a defendant is not excused from verifying his answer to a complaint charging him with having confessed or suffered a judgment, or executed a conveyance, assignment or other instrument, or transferred or delivered money or personal property with intent to hinder, delay or defraud creditors, or with being a party or privy to such a transaction by another person, with like intent toward the creditors of that person; or with any fraud whatever affecting a right or the property of another,—is aimed solely at fraudulent transfers and the like, but in other actions in which the defendant is charged with crimes or misdemeanors he may serve his answer unverified.

In an action for obtaining goods under false pretenses the defendant need not verify his answer.

(Decided July 12, 1884.)

Motion that the plaintiff's attorney be compelled to receive an unverified answer served by the defendant.

Sufficient facts are stated in the opinion.

Henry Wehle, for the motion.

Otto Horwitz, opposed.

MCADAM, Ch. J.—The complaint, which is verified, after alleging a sale and delivery of certain goods to the defendant, avers that the defendant was guilty of

Frist v. Climn.

fraud in contracting the liability and then sets out in detail specific misrepresentations to induce the credit given, and these are stated as the acts of fraud complained of. The defendant served an unverified answer, claiming that under section 523 of the Code the verification may be omitted whenever the party "would be privileged from testifying as a witness concerning the matters alleged." The rule is that a witness is not required to give any answer which will have a tendency to accuse him of any crime or misdemeanor or to expose him to any penalty or forfeiture; nor when by answering, a link may be added to the chain of testimony tending to such a result. *Code* § 837; 2 *Phillips Ev.*, Cowen, Hill & Edwards' Notes, 929; *Henry v. Salina Bank*, 1 *N. Y.* 83; *S. C.*, 3 *Den.* 593; 1 *How. App. Cas.* 173; *Wheeler v. Dixon*, 14 *How. Pr.* 151. The allegations of the complaint in effect charged the defendant with obtaining goods under false pretenses, and bring the case directly within the rule stated. Where any part of the pleading is of such a character the verification may be properly omitted. 3 *How. Pr.* 314; * 1 *Code R.* 69; * 3 *Abb. Pr.* 144; † 6 *Id.* 148; ‡ 14 *Abb. Pr. N. S.* 77; § 1 *N. Y.* 83; || *Constitution*, Art. 1, sec. 6; 12 *How. Pr.* 319; ¶ 2 *Hill.* 247; ** 24 *How. Pr.* 369; †† 24 *N. Y.* 74. ‡‡ Section 529 of the Code, relied on by the plaintiff, is taken from the 2 *R. S.* 174, and *Laws* 1883, ch. 14, sec. 1, and does not apply. That section provides that "a defendant is

* *Clapper v. Fitzpatrick.*

† *Blaisdell v. Raymond.*

‡ *Blaisdell v. Raymond*, *aff'd.*

§ *Fredericks v. Taylor.*

|| *Henry v. Salina Bank.*

¶ *Scovill v. New.*

** *Moloney v. Dows.*

†† *People v. Kelly.*

‡‡ *In re Hockley.*

Frist v. Climm.

not excused from verifying his answer to a complaint charging him with having confessed or suffered a judgment, or executed a conveyance, assignment or other instrument, or transferred or delivered money, or personal property with intent to hinder, delay or defraud creditors, or being a party or privy to such a transaction by another person with like intent toward the creditors of that person; or with any fraud whatever affecting a right or the property of another." It is not claimed that any but the latter portion of this section applies to this case, the preceding merely referring to confessed judgments, fraudulent conveyances, and the like. The words "or any fraud whatever, affecting a right or the property of another, which are claimed by the plaintiff as applicable," probably mean "affecting the property of another or some right susceptible of injury by the fraud." If these words mean anything more, it is difficult to imagine a case of fraud to which section 529 does not apply, and impossible to find one to which section 523 can be made applicable. Every action is founded on the invasion of some right, but that circumstance does not alone necessarily bring the case within the purview of section 529 which is aimed solely at fraudulent transfers and the like, in reference to which the defendant is not excused from answering under oath the charges of fraud made against him in the bill of complaint. But in other actions in which the defendant is charged with crimes or misdemeanors he may avail himself of section 523 and serve his answer unverified. Effect cannot be given to both sections except by holding that section 523 contains the general rule in regard to such verifications and that section 529 contains the exceptional one applicable only to the cases therein enumerated. How far a witness may be obliged to testify in respect to the exceptional matters need not be considered as that is not made the test. In all other cases it is.

Mehesy v. Kahn.

In the present instance the plaintiffs parted with all their property in the goods at the time of the sale. The action is to recover the contract price. Fraud is alleged as the inducing cause of the sale for the purpose of obtaining a judgment in a form in which the defendant may be made liable to arrest. But this does not make the action one affecting "a right of another" within the meaning of that term as used in section 529.

It follows that the defendant had the right to serve an unverified answer, and that the motions to compel the plaintiff to accept it must be granted.

MEHESY, APPELLANT, v. KAHN, ET AL., RESPONDENTS.

SUPERIOR COURT, GENERAL TERM, MARCH, 1884.

§§ 803, *et seq.*

Order for inspection of books, etc.—When granted.

The granting of power to search through the books of account to find isolated entries not particularized, to enable plaintiff to frame his complaint, rests in the discretion of the court, and it should only be allowed where the purpose and necessity of such examination are apparent.

Accordingly, where in an application for an order to examine defendants' books to ascertain the names of persons to whom defendants had sold certain merchandise in contravention of their agreement to sell only to plaintiff, in order to enable plaintiff to frame his complaint, the petition alleges that defendants did so sell to other persons:—*Held*, that the application should not be granted; that the knowledge or information which enabled plaintiff to make this distinct and definite statement, was enough to enable plaintiff to frame her complaint.

(Decided March 21, 1884.)

Meheszy v. Kahn.

Appeal from order of special term denying petition of plaintiff for inspection and copy of entries in account books of defendants in order to ascertain the names of the persons to whom defendants had sold "hare bellies," in violation of their agreement with the plaintiff, and in order to enable the plaintiff to frame her complaint.

Simpson & Werner, for appellant

The discovery sought is material and necessary, and in the present case absolutely indispensable. 1. Its materiality appears by reference to the written contract. The defendants contracted to give their entire product of bellies during the period mentioned, and that they did not do so is shown by the petition presented. 2. Its necessity is shown by the allegations that the names and amounts are recorded in the books named, during the period designated, and that the petitioner "has no means whatsoever, outside of said books, of discovering or determining the amount of hare bellies which the defendant had or obtained, or parted with and sold and delivered to parties other than your petitioner, and in violation of the contract," and this after the positive averment that the defendants did sell and deliver to other parties in violation of the contract. The plaintiff cannot possibly prepare a complaint, and truthfully verify it, as required by statute, without a disclosure, and if a complaint were by any possibility framed and served, the cause of action could be readily defeated by an application on the part of the defendants for a bill of particulars.

Benno Loewy, for respondent.

O'GORMAN, J.—There are many reasons why the decision of the special term should not be disturbed.

The granting the order applied for was very much

Mehesy v. Kahn.

within the discretion of that court, and we see no reason to believe that such discretion was not properly exercised in this instance.

The plaintiff states in her verified petition, that the defendants did sell largely to other persons, and offered her the refuse after such sales of the best material. If she is possessed of knowledge or information sufficient to enable her to make this distinct and definite statement under oath, there can be no difficulty in framing a complaint calling for a definite verified answer to that allegation.

The power to search through the defendants' account books in order to find isolated entries, not particularized, to enable the plaintiff to frame a complaint, is open to great abuse and should only be granted where the purpose and necessity of such examination are apparent. At a later stage of the proceedings, when the issues between plaintiff and defendants shall have been developed, other appropriate measures can be taken by the plaintiff to obtain the information now sought, if it be found to be then necessary.

The order appealed from is affirmed, with ten dollars costs.

SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

Strohn, v. Epstein.

STROHN, ET AL. v. EPSTEIN, ET AL.

CITY COURT OF NEW YORK, SPECIAL TERM, JULY,
1884.

§ 2464.

Receiver in supplementary proceedings—Notice of application for, when necessary.

At least two days' notice of an application for the appointment of a receiver in supplementary proceedings must be given, in every case except where the application is made on the return day of the order or warrant or upon the close of the examination. [1] Failure to give such notice is an irregularity for which the order should be set aside. [2]

Where upon the conclusion of an examination of one of two judgment debtors before a referee, in proceedings supplementary to execution on a judgment recovered for a copartnership debt, and upon filing the testimony taken before the referee a receiver of the property of the debtors was appointed without notice to them:—*Held*, that the order must be set aside, [2] and could not be confirmed; [3] also *Held*, upon proof that no other supplementary proceedings or judgment creditors' actions against the debtors were pending, and upon due notice of the application therefor that a receiver of their property should be appointed. [4]

(Decided July 25, 1884.)

Motion by defendants that an order appointing a receiver of their property be vacated and set aside.

The plaintiff recovered a judgment in this court against the defendants who are copartners, and after the return of an execution against their property procured an order requiring the defendant, Charles F. Hine, to attend before a referee and submit to an examination as to his property in proceedings supplementary to execution.

Strohn v. Epstein.

He did so, and the referee in due course reported the testimony to a judge of this court who thereupon without any notice having been given to the defendants appointed a receiver. This receiver accepted the trust and thereafter duly qualified. The defendants subsequently made this motion. It appeared that both the defendants were residents of the city of New York; that neither had notice of the application and that the defendant Epstein had never been examined in supplementary proceedings.

Arnoux, Ritch & Woodford, for the motion.

Billings & Cardozo, opposed.

McADAM, Ch. J.—My interpretation of section 2464 of the Code is that upon the return day of the order or warrant served in supplementary proceedings or [] upon the close of the examination, on both of which days the defendant is supposed to be present in person or by attorney, an application “without further notice” may be made, then and there, for the appointment of a receiver. But if the proceedings are had before a referee and not before a justice of the court, “at least two days’ notice of the application for the order must be given” in the manner provided by said section. In other words, that section was not designed to do away with the former notice required under the old Code, excepting in the two instances stated, when the defendant was supposed to be in court, personally or by legal representative, on which occasions a motion then and there was made to dispense with “further notice.”

The examination herein was had before a referee, and upon its conclusion the report and evidence were filed and on the following day a receiver was appointed without notice.

Strohn v. Epstein.

This was irregular practice for which the order
['] must be set aside. See 22 *Hun*, 226.*

No costs.

At the same time that the motion to vacate the order appointing receiver was made the following motion was argued.

Motion by plaintiff for order confirming order appointing receiver or for an order appointing Daniel P. Hays such receiver *nunc pro tunc*, or for an order appointing some suitable person, receiver of the personal and real property of the defendants Epstein and Hine, and of the firm of Epstein & Hine.

This motion was made upon a regular four days' notice of motion, and was accompanied by an affidavit showing that no other supplementary proceedings against the defendants were pending; that no receiver of their property had been appointed and that no action specified in article first, title 4, chapter 15 of the Code of Civil Procedure (judgment creditors' actions) were pending.

Further facts are stated, *supra*.

Billings & Cardozo, for the motion.

Arnoux, Ritch & Woodford, opposed.

McADAM, Ch. J.—The decision on the defendants' motion to vacate requires me to deny the plaintiff's application to amend.

The application to appoint a receiver, however,
['] must be granted. The notice of motion specifically asks for this relief. See *Code*, §§ 1932, 1934, 2461; *Clark v. Clark*, 11 *Abb. N. C.* 333; *Perkins v. Kendall*, 3 *N. Y. Civ. Pro.* 240, and cases cited.

The parties may agree upon the person to be appointed, or in default thereof I will name the person.

* *Sup. Ct. 2 Dept.*, *Ashley v. Turner*.

Henderson v. Scott.

HENDERSON, RESPONDENT, v. SCOTT, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL
TERM, JANUARY, 1884.

§§ 500, 1515, 1531.

Pleading—Former recovery when to be pleaded.—Damages on recovery of real property in ejectment—Ouster—What amounts to.

Although the defense of a former recovery may have been admissible in an action for *mesne* profits, after a recovery in ejectment prior to the Code, since the Code it must be specially pleaded.^[1]

In an action against one who was wrongfully in possession of real property, to recover the *mesne* profits during such possession, the defendant is not entitled to set off improvements made after he was expressly notified of the plaintiff's claim, and claimed to hold in exclusion of it,^[2] and, on the trial, a question as to what improvements were made, which was not limited to those made before that time, is properly excluded.^[3]

A conveyance of the whole of real property held in common, by one of two co-tenants to a grantee who claims to own the whole under such deed, is an ouster of the other co-tenant.^[4]

(Decided April, 1884.)

Appeal from a judgment on a verdict rendered at the Oswego county circuit, and from an order denying a motion for a new trial on the minutes.

The opinion states the facts.

B. B. & G. N. Burt, for appellant.

J. A. Hathaway, for respondent.

SMITH, P. J.—Action for *mesne* profits or rental value of real estate, after recovery in ejectment.

The complaint alleged that the plaintiff owned in fee, and was entitled to the possession of one undivided seventh of certain lots in the city of Oswego, described

Henderson v. Scott.

in the complaint; that the defendant, without the consent of the plaintiff, entered into the possession of the same in April, 1868, and has ever since occupied the same, and received the rents and profits thereof, which were of the yearly value of one hundred and fifty dollars, over and above taxes; and that in 1878, the plaintiff commenced an action in this court against the defendant to recover the possession of said premises, in which issue was joined and tried before a referee, and the plaintiff recovered a judgment decreeing that she was the owner and entitled to the possession of said premises, and that she is now in the possession of the same.

The defendant, by his answer, denied the complaint; and pleaded, first, that if the plaintiff is the owner and entitled to the possession of said premises, she is, and has been, for twenty years, such owner, as tenant in common with the defendant and those from whom he derives title, his share being six undivided sevenths of said lots; and secondly, in substance, that the defendant and those under whom he claims have made permanent improvements on said lots with the consent and acquiescence of the plaintiff, exceeding in value the amount of the plaintiff's claim, which they will set off against her claim. Some other defenses were set up, which are not material to the questions involved in this appeal.

The plaintiff replied denying the alleged counter-claim, and pleading the former judgment, and also the statute of limitations in bar thereof.

At the trial, the plaintiff put in evidence the judgment-roll in the former action, which showed that such action was commenced in January 1878, and that the plaintiff in her complaint therein alleged, among other things, that the defendant wrongfully occupied the premises about fifteen years, and during that time, without the plaintiff's consent, received the rents and

Henderson v. Scott.

profits thereof, which were of the yearly value of fifty dollars, and that in her complaint she demanded judgment for the possession of the premises, and also for five hundred dollars damages for the withholding of the same as above stated. The defendant denied the withholding of the possession, and that she had received the rents and profits. The record also showed that the referee found, among other things, that the defendant went into possession of the premises in March, 1868, and had remained in possession ever since, and that the rental value of the premises was \$120 per year, over and above taxes; and that the plaintiff was entitled to recover six cents damages for withholding the premises, and was not entitled to recover any portion of the value of the use and occupation of the premises, because not claimed in the complaint. Judgment was entered accordingly.

The defendant's counsel contended at the trial, and now claims, that whether or not the referee erred in holding that the plaintiff was not entitled, under her complaint, to recover for the value of the use and occupation, the judgment is a bar to her claim to recover therefor in this action. That position cannot be taken by the defendant, for the reason that he has not pleaded the judgment in bar. The defense of a former recovery may have been admissible, in an action ['] like the present one, under the general issue, prior to the Code (*Young v. Rummell*, 2 *Hill*, 478; *Beebe v. Elliott*, 4 *Barb.* 457); but since the Code it must be specially pleaded (*Old Code*, § 149; *New Code*, § 500; *McKyring v. Bull*, 16 *N. Y.* 297, 307; *Brazill v. Isham*, 1 *E. D. Smith*, 437; *S. C.*, *aff'd*, 12 *N. Y.* 9; *Hendricks v. Decker*, 35 *Barb.* 298). In *Brazil v. Isham*, the fact of the award of arbitrators, which was claimed by the defendant to be a bar to the action, was set up in the complaint, as is the former judgment here, but it not having been pleaded as a bar, it

Henderson v. Scott.

was held that the defendant could not insist upon it as such.

The defendant having been sworn as a witness in his own behalf, his counsel put to him the following question: "Have you, since you have been in the possession of these premises, made any improvements on the property?" The appeal-book states that the question having been objected to by the plaintiff's counsel, the trial judge said: "That question can be raised when they fix the time, of course it must be what improvements he has made prior to 1878. For the present, I will sustain the objection." The defendant's counsel excepted to the decision, but it does not appear that he modified the question, or renewed it in any form. The referee found in the former suit that on the 2d of February, 1878, the plaintiff demanded of the defendant one undivided seventh of the premises, and the defendant refused to give her possession of any part, denied her right to any portion, and claimed to own the whole. The defendant was not entitled, in [?] any view of the case, to recover for improvements made by him after he was expressly notified of the plaintiff's claim, and claimed to hold in exclusion of it, and as the question was not limited to improvements made before that time, it was properly excluded upon the ground stated by the court. [?]

The only other question is, whether an ouster was shown. The defendant proved that Owen Henderson, who originally owned five undivided sevenths of the premises, as a tenant in common with the plaintiff, in 1863 conveyed the entire premises to one Levaque, who mortgaged them to one Atkinson, and on a foreclosure of the mortgage they were conveyed to one Cummings, and that in March, 1868, Cummings, with others, conveyed them by warranty deed to the defendant. The court held that the conveyance of the whole by the co-tenant Owen Henderson, to a grantee

Stephenson v. Hanson.

who claimed to own the whole, under his deed, [4] was an ouster of the plaintiff; and so are the authorities (*Clapp v. Bromagham*, 9 *Cow.* 530; *Florence v. Hopkins*, 46 *N. Y.* 182). And this point was adjudged against the defendant in the former action, the referee having found that in March, 1868, the defendant went into possession of the said premises, claiming to own the whole thereof under title derived from the said Owen Henderson, and that by going into possession after taking such deed and claiming to own the whole, and expressly denying the plaintiff's right to any portion, and on demand refusing to yield possession of any portion, he had subjected himself to an action by the plaintiff to recover one undivided seventh of said premises.

The considerations above expressed cover most all the questions raised by the appellant's counsel.

The judgment and order should be affirmed.

HARDIN and BARKER, JJ., concurred.

STEPHENSON v. HANSON;—IN RE APPLICATION
OF WILLIAM J. HANSON.

CITY COURT OF NEW YORK, SPECIAL TERM, JUNE,
1884.

§§ 14, 812.

Contempt.—When surety to undertaking guilty of.—*Punishment.*—
Effect of appeal from judgment in action in which
undertaking was given.

A surety to an undertaking who falsely swears that he is worth double the penalty of the undertaking is guilty of perjury, which is a contempt of court, [2] and may be punished therefor by a fine

Stephenson v. Hanson.

sufficient to indemnify the defendant for the loss and injury he has sustained thereby, and by imprisoning him for six months and until the fine is paid.[²]

In such case, where the undertaking was given on procuring an order of arrest, the sureties' liability becomes fixed upon the date of the final vacating of the order of arrest, and the fact that an appeal has been taken from the judgment in the original action by the plaintiff therein is therefore immaterial.[³]

The power to punish for contempt is a branch of the common law, adopted and sanctioned by the constitution of this state.[⁴]

Instance of a case in which a surety on an undertaking was guilty of perjury.[¹, ²]

(Decided July 28, 1884.)

Motion to punish surety for contempt in swearing falsely as to his pecuniary responsibility.

John Kolter was a surety upon an undertaking, on which an order of arrest was granted, in a certain action in which this applicant was the defendant, and one Stephenson the plaintiff; the order of arrest therein was vacated.

Judgment was subsequently recovered by Hanson against the surety Kolter, for the sum of \$281.65, damages and costs, sustained by reason of his arrest.

In that action the defendant was examined as to his property, upon the return of execution wholly unsatisfied, and upon the facts disclosed this motion is made.

Further facts are stated in the opinion.

William B. Tullis, for the motion.

J. C. J. Langbein, opposed.

HYATT, J.—It is conceded that on June 9, 1883, the surety Kolter signed an undertaking, in the usual form, as surety upon an order of arrest in [¹] the action of Stephenson v. Hanson; Hanson al-

Stephenson v. Hanson.

leges that he also justified, by swearing that he was worth \$500 over and above all his debts and liabilities; the surety deposes, upon his examination as a judgment debtor in the action of Hanson v. Kolter, that although he signed and executed the instrument "he did not go before any notary upon that bond, and did not swear to the affidavit therein; that he signed his name and went away without reading the document"; but even if this statement is true, he at the same time deposed, that in the same action "he signed a second undertaking, marked filed July 20, 1883; that he signed the affidavit of justification therein, in the office of a lawyer and notary public, without reading or having it read to him, and supposes that he must have sworn to that affidavit before the notary public; that he has been watchman and housekeeper since May 1884, and prior to that time was a repairer of billiard tables; that he is married and supports a family; that he is not and was not prior to June 6, 1884 (date of the order for his examination as a judgment debtor), worth anything or possessed of any property, real or personal, or of any nature whatsoever, except household furniture exempt from execution; that he has no money except \$5.00 in the bank, and has had no other money in the bank for over a year last past."

He further deposes positively, "I have been in no better position pecuniarily, during more than a year last past, except, that I acquired in the Spring of 1883 a contingent interest in two second-hand billiard tables, with another, paying \$60 apiece, share and share alike, as part owner; in October 1883, I was paid \$75 for my interest; we advertised them for sale and was not offered any price for them, but think we could sell them for about \$175 apiece; I desire to state nothing to my foregoing testimony."

The examination was subscribed and sworn to

Stephenson v. Hanson.

(after having been read to him) by the said judgment debtor June 9, 1884.

Upon the 17th of June, 1884, his examination was continued. He then deposed as follows: "Upon my former examination I was not represented by counsel, as I am now; I reside at 111 Fifth Avenue, New York City; I am watchman and housekeeper at that place for August Belmont; I have been with him as watchman fourteen years; when I was examined before, I thought that reference was only made to my property in this city, when asked about my property; I own three lots of ground in Cook county, Illinois, near Chicago; I got them from Thomas Back, to whom I loaned \$100; I produce the deed he gave me; he has never paid any part of the loan; the date of the loan was February 23, 1878; he was to return it March 23, 1878; I have paid taxes ever since; it is free and clear of incumbrances; in the year 1878 those lots were worth \$1,300, and they have increased in value since; I have seen Mr. Back since, he said he had no money, could not pay me, and was sorry, that I could keep the lots, that his wife was dead and he never could pay me; the billiard tables are worth \$250 apiece; I did not read the undertakings when I signed them, they were not explained to me and I did not know what they were; when I signed the undertakings, I considered myself worth double the amount therein mentioned, and do so now."

Upon his cross-examination he testified: "I knew I was signing undertakings, naturally enough I knew when I signed them, I must be worth some hundreds of dollars; I was born in New York City; went to primary school, also night school; I can read; I have taken no proceedings to perfect title under the deed, I don't know where the grantor is, have not seen him for a year last past; I paid taxes all along, the yearly taxes are two dollars and some cents, never saw the

Stephenson v. Hanson.

lots, my idea of their value is derived from the consideration stated in Cumming's deed to Back; I don't know whether the lots are improved or not, nor how far they are from Chicago; I have heard that their value was more than \$1,300."

After a careful examination of Kolter's testimony as thus fully set forth, I cannot reconcile its many inconsistencies of statement, and fail to find either excuse or justification for the positive contradiction of facts, sworn to by the judgment debtor upon his first examination.

Kolter is an intelligent man, has had some schooling, his occupation calls for the possession of judgment and the exercise of shrewdness, it would naturally surround him by associations tending to increase, rather than diminish, those faculties, and certainly, in some degree, to impress him with a sense of responsibility for his acts; he knew what an undertaking was and the obligation it imposed, that on each occasion he had signed the undertaking, and upon one at least, the affidavit of justification; he claims he did not swear to the first, but supposes he did to the second, before the notary present; yet upon his direct examination, June 17, 1884, he swore "I did not read the undertakings when I signed them, and did not know what I was signing;" and then upon his cross-examination he swore "that it entered into his mind what he he was worth, at the time he signed, because he then knew he was signing undertakings, and that naturally enough he knew when he signed, he must be worth hundreds of dollars."

On the first examination it appears, that his occupation as night watchman and housekeeper commenced May 1884, and that he had not owned any property within a year except a half interest in two second hand billiard tables, for which he accepted \$75, although he thought they could be sold for \$175 apiece, notwith-

Stephenson v Hanson.

standing they had been advertised and no offer received for them.

On his second examination he testified that his occupation, as formerly sworn to, had existed for the past fourteen years, and that the said tables were worth \$250 apiece.

The judgment debtor's explanation, of his contradictory statements, made at the two examinations, is insufficient, and under all the circumstances, incredible. I cannot believe that on his first examination he was puzzled, or thought that the examining counsel referred only to property in the city. When asked as to his real and personal property, he positively stated that he was not worth anything or possessed of real or personal property of any nature whatsoever, except what he expressly claimed was exempt from execution (household furniture); that he had been in no better position (June 9, 1884) for more than a year last past, nor within that time owned or been possessed of any other property except the billiard tables. It is probable that it occurred to the mind of the judgment debtor, that on the 19th of July, 1883, he had executed an undertaking, upon an order of arrest and had sworn to the affidavit of justification, annexed thereto, to the effect that he was worth \$500 over and above all his debts and liabilities; whereupon, at the second examination, he admitted the ownership of three lots of ground in Illinois, conveyed, together with a gold watch, by one Back and wife to secure a loan, from him to them, of \$100, February 23, 1878, and that the loan had never been paid; that he had seen Back a year ago, who told him that he could not pay and that he could keep the lots; he then further testified that he had never seen the lots; that he knew little or nothing about them and had heard that they were worth more than \$1,300.

The most plausible inference that can be drawn

Stephenson v. Hanson.

from that statement, is that when the judgment debtor swore that he had no property, he believed the lots to be without any value; and in view of their abandonment, together with the gold watch, and of the entire absence of proof of any value, I shall consider their value at \$100.

My judgment therefore, based upon all the facts before me, leads to the conclusion, that when the surety executed the undertaking, he was possessed of five dollars in the Bowery Savings Bank, an interest in two billiard tables of the value of \$75, and three lots in Illinois of the value of \$100, property amounting in all to \$180, and that the affidavit of justification attached to the said undertaking, sworn to July 19, 1883, was false.

So long as the law of this state provides for arrest in civil proceedings, its requirements should be enforced with literal exactness. The defendant Hanson was entitled to two sufficient sureties, as provided in section 559, Code of Civil Procedure, and he would not have been arrested and held to bail, if Kolter had not acted as surety, and falsely sworn that he was worth the sum in which he justified.

It is no slight matter to deprive a person of his liberty, and cause, or aid in causing, his imprisonment without due process of law; yet this surety seems to have regarded his performance as a most trivial one, and frankly testifies, seemingly as an adequate apology, "that he went on the undertaking as a matter of friendship for Mr. Stephenson and received not one dollar for it."

It is to be regretted that he is not alone in his flimsy view of the law, and that he has so large a following of others who regard the act of becoming a surety, as simply perfunctory, and not one of the necessary safeguards against the possible, and too fre-

Stephenson v. Hanson.

quent, abuses and perversions, of the provisional remedy of arrest in civil actions.

The surety was guilty of perjury, which is [2] a contempt of court (*Stackhouse v. French*, 1 *Bing.* 365).

Section 2285, Code of Civil Procedure, empowers the court to punish that offense, by imposing a fine, sufficient to indemnify the defendant for the loss [3] and injury he has sustained, through the surety's misconduct, and by imprisoning him for six months, and until the fine is paid.

The power to punish for contempt is a branch of the common law, adopted and sanctioned by the [4] constitution of this state (*Yates v. Lansing*, 9 *Johns.* 416 ; *Eagan v. Lynch*, 3 *N. Y. Civ. Pro.* 236).

The language of the undertaking fixes the maturity of the surety's obligation, upon the date of the [5] order (May 6, 1884), *finally vacating the arrest* ; the fact that the plaintiff has appealed from the judgment in the original action is therefore not material.

It is urged that the surety did not willfully and knowingly mislead the court, and intentionally swear falsely ; if so, I will extend to him the benefit of the doubt, and will not inflict the punishment of six months' imprisonment, as for a criminal contempt.

The power and duty of the court is to redress the wrong of the injured party ; it can make no difference to him, whether the contempt was designedly or negligently committed, his loss is the same in either event.

The actual loss occasioned by the wrongful act of the surety Kolter is the amount of the judgment recovered against him by Hanson, in the action upon the undertaking, to wit : \$281.65 with interest, and

Laude v. Smith.

\$50, allowed as reasonable counsel fee for the legal services required in the proceedings.

The surety is fined that amount and his commitment is directed until the fine is paid.

LAUDE v. SMITH, IMPLEADED, ETC.

SUPREME COURT, ONEIDA COUNTY, SPECIAL TERM,
JULY, 1883.

§§ 450, 1206.

Action for slander against married woman—Making husband party to.

In an action against a married woman for slander, her husband cannot properly be made a party defendant

Sections 450 and 1206 of the Code of Civil Procedure, construed.

(Decided July 2, 1883.)

Demurrer to complaint.

The facts are sufficiently stated in the opinion.

J. Mathews, for the demurrer.

S. J. Barrows, opposed.

MERWIN, J.—The defendants are husband and wife. The action is to recover damages for slander uttered by the defendant Louisa Smith, of and concerning the plaintiff. It is not alleged to have been uttered in the presence or by the direction of the husband Thomas Smith. The only reason for making him a party exists in the allegation that he is the husband. The defendant Thomas Smith demurs to the

Laude v. Smith.

complaint on the ground that it does not state facts sufficient to constitute a cause of action against him, and that he is not a proper party. So that the question is whether the husband in an action against the wife for her separate personal tort is a proper party defendant. Judicial opinion on this subject is not harmonious (*Fitzgerald v. Quann*, 1 *N. Y. Civ. Pro.* 273, *Fitzsimons v. Harrington*, 1 *Id.* 360; *Hoffman v. Lachman*, 1 *Id.* 278, *note*; *Berrien v. Steel*, *Id.* 579, *note*; *Trebing v. Vetter*, 12 *Abb. N. C.* 302, *note*; *Muser v. Miller*, 3 *N. Y. Civ. Pro.* 388, 394). I am therefore called upon to form an opinion for myself. Concededly, before the adoption of the Code of Civil Procedure, the husband was a necessary party defendant, not on the ground that in contemplation of law he was guilty of the act, but from the incapacity of the wife to be sued without her husband (*Kowing v. Manley*, 49 *N. Y.* 192, 198). Section 450 of Code of Civil Procedure, when it took effect in 1877, was as follows: "In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she were single." This apparently was intended to sweep away all distinctions between a *feme sole* and a *feme covert*, in respect to suing and being sued, and was broad enough to accomplish the purpose (*Janinski v. Heidelberg*, 21 *Hun*, 439). By section 1206 of the same Code it was provided that a judgment against a married woman may be rendered and enforced as if she were single, and the revisor remarks that there seems to be no sufficient reason for preserving any longer the remnants of the distinction between actions against married women and actions against other persons. In view of the provisions of sections 450 and 1206 it would seem very clear that the reasons of the rule requiring the husband to be a party defendant were entirely gone (65 *Ill.* 129; 120 *Mass.* 89).

At common law the husband was a necessary party

Laude v. Smith.

plaintiff in an action brought for personal injuries to the wife. This rule was abrogated by the provisions of section 7, of chap. 90 of the Laws of 1860, as amended by section 3 of chap. 172 of 1862 (*Mason v. Marsh*, 35 *Barb.* 68 ; *Rumsey v. Lake*, 55 *How. Pr.* 339). These provisions were repealed by the repealing acts of 1880, chap. 245. So that the rights of married women to bring actions in their own names for personal injuries now rests on section 450 of the Code. (See Revisor's note to section 1906.) I find no other law authorizing it. Still it is said that the addition by amendment in 1879 to section 450 of the words, "It is not necessary or proper to join her husband with her as a party in an action or special proceeding affecting her separate property," call for the construction, now, of the whole section to the effect that in actions not affecting her separate property, the husband must be joined. If that is so then in all actions for personal injuries of the wife, the husband must be a party plaintiff.

I do not believe any such result was intended. The repeal by the act of 1880 of the provisions of 1860-2, was not with the idea that married women should be thrown back to such remedies as they had prior to 1860, but upon the theory that section 450 as it stood in 1880, gave them in substance the same rights they had under the law of 1862. True, the reason for the amendment of 1879 is not very apparent. Very likely it was designed to apply to some special case that had somewhere arisen. At most, it was a re-enactment of what then in fact existed, but in a wider and more comprehensive form. Such re-enactment of a part should not affect the validity of the remainder, especially when important rights were involved.

In my opinion the husband is not a proper party defendant. The demurrer is therefore sustained with leave to the plaintiff to amend, on payment of costs of demurrer.

Lidgerwood Manufacturing Co. v. Baird.

LIDGERWOOD MANUFACTURING COMPANY
v. BAIRD.SUPERIOR COURT OF THE CITY OF NEW YORK,
SPECIAL TERM, AUGUST, 1884.

§§ 500, 524.

Pleading—Denial in answer on information and belief.

Where a defendant has information sufficient to form a belief as to the truth of an allegation in the complaint, but no personal knowledge of the facts, he may deny it on such information and belief. It was not the intention of the legislature to compel a party to admit an allegation that he is satisfied is false, but of which he has no personal knowledge, or else commit perjury by an absolute denial or an allegation of want of information sufficient to form a belief.

Pratt Manufacturing Co. v. Jordan Iron, &c. Co. (5 *N. Y. Civ. Pro.* 372), distinguished; Brotherton v. Downey (21 *Hun*, 436), followed.

(Decided August 1, 1884.)

Motion to strike out certain allegations of the complaint as irrelevant and redundant.

The plaintiff, a domestic corporation, brought this action to recover certain chattels which it alleges the defendant wrongfully detains from it. The defendant claims to own the chattels, having purchased them from the one who bought them at the foreclosure of a chattel mortgage thereon made by one Palmer Sessions. The plaintiff avers that Mr. Sessions was a mere bailee of the chattels, while the defendant asserts that he was the owner.

In his answer the defendant denied several allegations of the complaint, among others those alleging ownership in plaintiff and the wrongful detention by defendant, upon information and belief.

Lidgerwood Manufacturing Co. v. Baird.

James White, for the motion.

Cited *Heckett v. Richards*, 11 *N. Y. Legal Obs.* 315 ; *Pratt M'fg. Co. v. Jordan Iron, &c. Co.*, 5 *N. Y. Civ. Pro.* 372 ; *Swinburn v. Stockwell*, 58 *How. Pr.* 312 ; *Therasson v. McSpedon*, 2 *Hill.* 1 ; *Code Civil Procedure*, § 500 ; *Code of 1848*, § 128 ; *Code of 1849*, § 149.

Joseph Fettretch (*Thomas H. Cook*, attorney),
opposed.

INGRAHAM, J.—The denial in the answer in this case differs from the answer in *Pratt M'fg Co. v. Jordan Iron &c. Co.* (5 *N. Y. Civ. Pro.* 372), and is in form similar to the answer in *Brotherton v. Downey* (21 *Hun*, 436). The defendant having information sufficient to form a belief as to facts in the 2d paragraph of the complaint but without personal knowledge of such facts, would be guilty of perjury under section 524 of the Code if he either denied the allegation absolutely or alleged he had no knowledge or information sufficient to form a belief of their truth. The note to section 524 says that one of the objects of this section was to compel the pleader, when the denial is on information or belief, to state such facts in the answer itself. See Mr. Throop's note to section 524. I do not think that it could have been the intention of the Legislature to compel a party to admit an allegation that he is satisfied is false, but of which he has no personal knowledge, or else commit perjury by an absolute denial or an allegation of want of information sufficient to form a belief. I will therefore follow *Brotherton v. Downey* (*supra*). Motion denied, but without costs.

Allen v. Swan.

ALLEN, RESPONDENT, v. SWAN, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL
TERM, OCTOBER, 1883.

§§ 3016, 3070.

Justice's court—When offer to reduce verdict may be made—Effect of such offer made after judgment—Power of justice to alter or change record—Appeal—Right to costs.

A justice of the peace upon the receipt of a verdict in an action tried before him should forthwith render judgment and enter it in his docket. After he has done so he is without jurisdiction or authority to alter or change the record in any respect.

After judgment has been rendered and entered in an action in a justice's court an offer by the successful party to reduce the judgment is wholly ineffectual for that purpose and the judgment remains as it was entered, notwithstanding an entry by the justice in his docket of the fact that the offer had been made. Section 3016 of the Code does not recognize any such proceeding but merely authorizes the party in whose favor a verdict is rendered to remit a part and take judgment for the residue.

Where in an action in a justice's court judgment was entered in favor of the plaintiff for \$34.50 damages, and \$18.87 costs, and the plaintiff thereafter offered to reduce the judgment to \$19.21 and costs, and the defendant appealed from the judgment and the plaintiff thereupon offered to allow judgment to be rendered in the appellate court in her favor for \$19.21, and \$18.47 costs of the court below and the defendant served a notice that he accepted so much of the offer as related to damages and rejected so much as related to costs, and a trial was had in the appellate court which resulted in a verdict in plaintiff's favor for \$19.21: *Held*, that the defendant was entitled to the costs of the appeal.

(Decided April, 1884.)

Appeal from Onondaga county court denying motion of defendant for retaxation of costs herein, and that the clerk be directed to tax costs in his favor.

Allen v. Swan.

This action was originally tried in a justice's court in the city of Syracuse, before a jury. The complaint was upon an assigned account for work, labor and services, and the plaintiff demanded judgment for \$19.21. The answer was a general denial, payment, and a counter-claim for more than \$50. The jury in the court below rendered judgment in favor of plaintiff for \$34.50, being \$15.29 more than was demanded in the complaint or proved upon the trial, and the justice immediately entered judgment in favor of plaintiff for \$34.50 damages and \$18.87 costs, in all \$53.37.

The next day, and before any further steps were taken in the action, the plaintiff filed with the justice an offer in writing to remit the excess over the amount for which judgment was demanded in the complaint.

The justice refused to modify the formal entry of judgment in his docket, but made a minute of the fact that the offer had been made in his docket.

On December 1, 1882, the appellant duly appealed to the Onondaga county court for a new trial on the merits.

On December 4, 1882, the respondent served on appellant an offer under section 3070 of the Code of Civil Procedure, "to allow judgment to be rendered in the county court of Onondaga, in favor of Anna M. Allen and against George E. Swan, for the sum of \$19.21 damages, with \$18.87 costs of the court below," and the appellant's attorneys thereafter served on the respondent's attorneys an offer accepting the respondent's offer of compromise, so far as the same related to the \$19.21 damages, but declined the balance which related to the \$18.87 costs.

The cause in due time came to trial in the county court, before the court without a jury, a jury having been waived, and the defendant offering no evidence, judgment was rendered in favor of the plaintiff for

Allen v. Swan.

\$19.21 damages, being the precise sum to which plaintiff had already twice offered to reduce her judgment.

The clerk against appellant's objection taxed costs of the appeal in favor of the respondent. The appellant thereupon moved in the county court for an order setting aside the clerk's taxation of costs, and allowing costs to appellant. The county court denied this motion and affirmed the order of the clerk. From the order of the county court this appeal is taken.

Jay Kline (Gray & Kline, attorneys), for appellant.

Section 3016 does not authorize or permit a party to reduce a judgment already recovered, but upon the rendering of the verdict, to remit any part thereof and take judgment for the residue. Before the Code there was a similar statute. . . . 3 *R. S.* (Banks' 6th ed.) 418. . . . It is fairly held under this last statute that the remission must be made before judgment is entered. 2 *Wail's Law and Practice*, 688-693. After judgment has been entered it cannot be changed and is conclusive. 2 *Id.* 701-702.

J. Page Munro (Hancock & Munro, attorneys), for respondent.

Under section 3016 of the Code of Civil Procedure, the party in whose favor a verdict or judgment is rendered may remit any portion thereof at any time either before or after judgment, until the aggrieved party has served his notice of appeal, and the cause being thereby removed to another court, the jurisdiction of the justice has ended. . . . Statutes providing for compromises of this character are intended to prevent and suppress needless litigation and should be so construed as to carry out the intention of the law-makers. *Wynkoop v. Holbert*, 43 *Barb.* 266.

The right to remit a portion of an excessive verdict before judgment in justice's court was settled before

Allen v. Swan.

the adoption of the new Code. *Burger v. Kortright*, 4 *Johns.* 414. . . .

If under section 3016 the respondent was entitled to make the offer which she has made, after the rendition of judgment, then she was entitled as a matter of right to have the judgment modified upon the justice's docket to correspond therewith. The act of the justice in so modifying the docket would have been not a judicial but a ministerial act, and although the actual formal modification was not made, it will be regarded by the appellate court as having been made. *Stephens v. Santee*, 49 *N. Y.* 35; *Bradner v. Howard*, 75 *Id.* 417-419. . . .

If section 3016 provided only for the remission of the verdict of a jury, or of some portion thereof, there might be some ground for believing that the remission must be made before judgment. But the section also provides that the remission may be made in the case of "the decision of a justice without a jury." In the latter case the remission can in no case be made till after judgment, because the decision of the justice is the judgment. Bouvier defines the term "decision" thus: "A judgment given by a competent tribunal." This definition is applicable to our justice's courts, because the statute has never provided for any mode of announcing the decision of a justice of the peace before judgment, or otherwise, than by entering judgment upon his decision. . . .

In *Seaman v. Ward* (1 *Hill.* 52, 53), the court say: "There is no such thing as a judgment rendered in the mind of the justice. Judgment is a judicial act, not a mental resolution. It is not enough that the judge concludes to render judgment; he must declare it. He must declare it by an official act, such as indorsing an entry or minute of his decision upon the process returned before him, from which the clerk

Allen v. Swan.

dockets or registers the judgment, as it has been rendered by the justice. . . .

After the appeal was taken the respondent duly served an offer under section 3070 to allow judgment to be entered in his favor as already stated, for \$19.21 damages, and \$18.47 costs of the court below. . . .

Under the old practice pursuant to section 371 of the Code of Procedure, the rule was always in the offers made upon both sides to separate the damages and costs. *Myers v. White*, 37 *How. Pr.* 393; 4 *Wail's Pr.* 397, *ad fin.* 413, *ad fin.*

BARKER, J.—Upon the receipt of the verdict it is the duty of the justice forthwith to render judgment and enter it in his docket-book (*Code*, § 3015).

All agree after the performance of this act he is without jurisdiction or authority to alter or change the record in any respect. In my opinion, the offer of the plaintiff to reduce the judgment was wholly ineffective for that purpose, and that it remained as it was entered, a judgment for \$34.50 damages and \$18.87 costs, notwithstanding the entry made by the justice. Section 3016 does not recognize any such proceedings. It is merely a statutory permission authorizing the party in whose favor the verdict is rendered to remit any portion thereof, and take judgment for the residue. A record of judgment made up and entered according to the rules and practices of the court in which the action is pending cannot be altered or amended by an *ex parte* motion of either party; this is a general rule applicable to all courts. The offer of the plaintiff to reduce the judgment, and the entry made by the justice in his docket is a proceeding unknown to the law.

There is no power or authority vested in any court or officer to regulate the practice by which such a result may be reached. To admit the right of the plaintiff to make and file an offer with a view of altering the

Allen v. Swan.

record, would be mischievous, misleading, and often result in dispute and contentions between the parties. If the party in whose favor the judgment is entered may authorize the justice to modify the same by reducing the amount thereof, he may do it any moment before the notice of appeal is served. This might be done by the party claiming the right, at such time and under such circumstances, as to make it exceedingly difficult for the party feeling aggrieved by the judgment to determine whether his interest would be best served by acquiescing in the judgment as reduced by the offer, or to seek further modification by appeal. In this case it does not appear that the appellant had notice at the time he served notice of his appeal, that the offer had been made and filed, and that the justice had made an entry in his docket of the fact. If the offer as made and filed with the justice had been brought to the appellant's attention, he could not have determined by an inspection of the same whether or not the attorney who signed it in the name of the plaintiff was authorized to make the offer. The instrument is not acknowledged by the plaintiff, nor is it accompanied with any evidence that the attorney who executed it was authorized to perform the act.

In my opinion the appellant was entitled to the costs of appeal in the county court, and that it should be so ordered.

Order reversed and costs awarded to appellant, with costs.

SMITH, P. J., and HARDIN, J., concurred.

Estate of Le Baron.

ESTATE OF CALEB B. LE BARON, DECEASED.

SURROGATE'S COURT, KINGS COUNTY, JULY, 1884.

§§ 828, 829, 2750.

Proof of claim against decedent's estate.—Evidence by claimant of personal transactions with deceased.—Debts not discharged by discharge in bankruptcy.—Administrator.—Subrogation of claim of, for money paid to redeem real property from tax sale in place of lien of taxes.

The fact that claims against a decedent's estate have been presented to the administrator, and by him admitted to be valid claims against the estate, establishes *prima facie* their validity, and puts the burden of proving their invalidity upon those who object thereto.[¹]

To exclude evidence under section 829 of the Code of Civil Procedure, which provides that "a person or a party interested in the event . . . shall not be examined in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person," etc., the case must be brought strictly within the wording of the statute; it is not enough to be within its spirit.[^{2, 3}] Accordingly, *Held*, where claims against a decedent's estate, which were admitted by the administrator and not objected by the decedent's survivors, were supported by the testimony of the claimants, that a mere creditor could not take advantage of it.[^{4, 5}]

Where a bankrupt willfully and fraudulently omits the names and claims of certain of his creditors from his schedule of debts, and gives them no notice of the application for his discharge, the discharge can be attacked by them after his decease in a proceeding in the surrogate's court for the settlement of his estate, and so far as the discharge affects such creditors it is inoperative.[⁶]

Where an administrator in order to prevent the waste or loss of the real property of his decedent redeemed the same from tax-sale and paid the taxes, and it appeared that such real property was the only property of any value left by the deceased, and that his debts exceeded the value of all his property:—*Held*, that while the

Estate of Le Baron.

administrator strictly had nothing to do with the real estate of the decedent, [8] the sum paid by him with interest from the date of payment should be allowed as a preferred claim against the decedent, and he should be subrogated to the right the state had against the property for the unpaid taxes. [10, 11]

Bachelor v. Low (8 Nat'l. Bank'cy. Reg. 577); [9] *Poillon v. Lawrence* (77 N. Y. 211), [7] followed.

(Decided July 18, 1884.)

Application for the sale of decedent's property to pay his debts.

The opinion states sufficient facts.

Blanchard, Gay & Phelps, for administrator, and for Mary E., Oceana H. and Anna G. Le Baron.

George Wilcox, Rufus L. Scott, Wilson M. Powell, Adrian Van Sinderen and *A. W. Gleason*, for creditors.

BERGEN, Surrogate.—This is an application brought under section 2750 of the Code of Civil Procedure, directing the sale of real property of a deceased person for the payment of his debts.

Upon the return of the citation a number of creditors appeared and presented their claims.

The claims of Anna G. Le Baron for \$2,405.57; Oceana H. Le Baron for \$19,305.50; and Mary E. Le Baron for \$23,372.53, and of the administrator for the sum of \$926.40 were disputed.

It appears by the evidence that the personal property is insufficient to pay the debts of the decedent, and therefore the creditors are compelled to resort to the real estate of the decedent for the payment of the same.

It also clearly appears that the debts of the decedent are largely in excess of the value of the real estate, and that in no event could the creditors receive more than a small *pro rata* amount of their claims.

Estate of Le Baron.

William A. Jones, who has presented and proved his claim, objects to the claims of the Le Baron family, to wit : Oceana H. Le Baron, Mary E. Le Baron, and Anna G. Le Baron, who are sisters of the decedent.

First. Upon the ground of the proof of the indebtedness is too indefinite.

Second. That under section 829 of the Code, all the evidence of these parties concerning conversations or transactions with Caleb B. Le Baron should be excluded.

Third. That the discharge in bankruptcy of Caleb B. Le Baron estops these claimants from establishing their claims.

I have carefully reviewed all the testimony taken in these proceedings, and am of the opinion that these claims were sufficiently proved, unless the testimony given by the claimants as to the conversations and transactions with the decedent should be stricken out.

It appears from the account of the administrator on file in this office, and the evidence in these proceedings, that the administrator had admitted these claims.

The petitioning creditor simply objects to the said claims, but offers no evidence to show that they are not valid.

It seems to me that the claims having been presented to the administrator, and by him admitted ['] to be valid claims against the estate, establishes *prima facie* their validity, and puts the burden of proof upon the objector. Matter of Fraser (92 N. Y. 239).

Section 828 of the Code declares "that a person shall not be excluded or excused on account of interest, except as otherwise specially provided."

Nor do I think that it comes within the exception provided in section 829 of the Code, which declares, ['] "that a person or a party interested in the event . . . shall not be examined in his own be-

Estate of Le Baron.

half or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . except when the executor, administrator or survivor . . . is examined in his own behalf concerning the same transaction or communication."

To exclude evidence under this section, the case ['] must be brought *strictly within the wording of the statute*; it is not enough to be within its spirit. *Severn v. National Bank of Troy* (18 Hun, 228); *Lobdell v. Lobdell* (36 N. Y. 327).

The testimony referred to is not against the administrator or survivor as the statute says it must be. The administrator admits the claims, and the survivor does not object to the evidence.

The objector is merely a creditor of the decedent; ['] the statute was enacted to protect the representatives of deceased persons, and they are the only persons who can take advantage of it.

The claimants in this proceeding are the sisters, heirs and survivors of the decedent. They loaned him a large portion of their property and trusted implicitly in his integrity and ability to pay them.

In my opinion they have a strong legal and moral claim upon his estate for the payment of the same. The only question remaining to be determined is, does the discharge in bankruptcy of Caleb B. Le Baron in 1868 operate as a discharge of these claimants' debts?

It appears from the evidence that the claim of Anna G. Le Baron arose after the discharge was granted, and therefore is not affected by it, and that the portions of the claims of Oceana H. Le Baron and Mary E. Le Baron which arose prior to the granting of the discharge are not barred by it, inasmuch as the proceedings in bankruptcy of Caleb B. Le Baron omitted to mention them as creditors, and that they did not

Estate of Le Baron.

receive any notice of the said proceedings, and that they had no knowledge that he had been discharged in bankruptcy.

I am of the opinion from the evidence that the decedent, Caleb B. Le Baron, willfully and fraudulently omitted their names from the schedule of his debts in bankruptcy; that he never caused them to be notified of the said proceedings for his discharge, that he knew he was in debt to these claimants, his sisters, and knew where they resided, as they frequently visited him at his office during and before the time when the proceedings in bankruptcy were in progress. He commenced in 1850 paying money on account of his indebtedness to each of his said sisters, and continued so doing until within a month of his death. By omitting their names from the schedules in bankruptcy and keeping them and each of them in entire ignorance of his proceedings therein, he deprived them of the right to resist his discharge or to participate in their share of the dividends of his assets.

In the case of *Bachelder v. Low* (8 *Natl. Bank'cy Reg.* 571), it was held, that the discharge is to be pleaded in suits upon claims in courts where pending, and those courts must, to some extent, determine the validity and effect of the pleas. No other court could consider them and render judgment upon them in those cases. The provision in the same section, that the certificate shall be conclusive evidence of the fact and regularity, seems to relate to the mode of proof of the discharge, and not the effect of it when proved. As now understood the provisions of the bankrupt act do not prevent plaintiffs from contesting the validity of the discharge, as to them, in this court, by showing that it was obtained upon proceedings of which they were fraudulently deprived of notice. In the case of *Poillon v. Lawrence* (77 *N. Y.* 211), ['] it was held, that where a bankrupt applied for a

Estate of Le Baron.

discharge in a name other than the one in which he contracted the debt, thus depriving the creditor of any notice of the application for his discharge, that it could be attacked in the court in which the creditor sought to establish his claim, and that the discharge would be held inoperative as to the debt of the creditor defrauded thereby, by reason of the failure to make him a party to the proceeding, by proper publication or otherwise.

I am therefore, led to the conclusion that by reason of the bankrupt having willfully and fraudulently [6] omitted the names and claims of his sisters from his schedule of debts and not having given them any notice of the application for his discharge, that the discharge can be attacked by them in this court, and that so far as the same affects said sisters it is inoperative.

In reference to the claim of the administrator for having paid taxes upon property at East New York, Kings County, amounting to \$926.40 on November 20, 1883, it appears from the evidence, that the same had accumulated upon the property now sought to be sold under these proceedings for the years, 1871, 1872, 1873, 1874, 1875 and 1876, and the property was sold by the state comptroller for arrears of taxes of those years, and that the administrator redeemed the same on the 20th day of November 1883, in order that the property might not be charged with the additional interest of ten per cent.

While the administrator, strictly, has nothing to do with the real estate of the decedent, and has [7] no right to apply the personal property in payment of claims against the real estate, still, the only property the decedent left of any value was this real estate in question, and the administrator having acted in good faith and for the best interest of the estate in redeeming the property from the sale for

Estate of Le Baron.

the unpaid taxes, which had been levied and confirmed as a lien upon this real estate prior to the death of the decedent, I think that the same should be allowed to the administrator as a preferred claim against the [10] decedent, with interest thereon from November 20, 1883. For if it had not been redeemed, the taxes would still remain as an existing and first lien upon this property. The administrator having paid them, he should be subrogated to the right the [11] state had against the property for the unpaid taxes.

I am of the opinion, that the following claims are entitled to preference in the following order, to wit :

1st. The claims of the administrator for the amount paid by him to the state treasurer, November 20, 1883, to redeem the property in question from the sale of taxes, with interest from that date, \$926.40. Interest from November 20, 1883.

2d. Long Island Bank judgment against decedent, \$462.16. Interest from June 19, 1876.

3d. Balance due on judgment recovered by C. Van Brunt and others against decedent, \$282.07. Interest from March 4, 1882.

[Here followed a list of general claims proved against the estate.]

A decree may be entered in accordance with this opinion upon two days' notice.

Sweet v. Sanderson Brothers Steel Co.

SWEET v. SANDERSON BROTHERS STEEL
COMPANY.SUPREME COURT, ONEIDA COUNTY, SPECIAL TERM,
APRIL, 1884.

§§ 419, 422, 479.

Complaint.—Effect of service of, after service of summons and before appearance of defendant.

Where a copy of the complaint in an action was served on the defendant two days after the summons was served and before he had appeared : *Held*, that the plaintiff acquired no rights thereunder ; that a motion by the defendant to set aside the service was proper, and should be granted, notwithstanding he had returned the copy complaint to the plaintiff.

(Decided April 19, 1884.)

Motion by defendant to set aside the service of a copy of the complaint.

This action was commenced April 1, 1884, by the service of the summons on the president of the defendant. On April 3, and before the summons had passed from his possession, a copy of the complaint was served on him, on which was endorsed the following notice : " Lucius Gleason, Esq., President Sanderson Brothers Steel Company. Sir : A summons in case of William A. Sweet against Sanderson Brothers Steel Company was served on you, as its president, April 1, 1884. The complaint herewith served on you is the complaint in that action, dated April 3, 1884," etc. On the following day (April 4) the copy of complaint so served was returned to the plaintiff's attorneys with a notice indorsed thereon that it was returned because :

Sweet & Sanderson Brothers Steel Co.

"1st. The said copy of the complaint was not served with the summons as provided by section 419 Code Civil Procedure.

"2d. The defendant has not demanded a copy of the complaint as provided by sections 422 and 479, although the time in which to do so has not elapsed. Said copy of the complaint was not served upon the defendant with the summons, nor in pursuance of any demand on the part of the defendant therefor."

Thereafter the defendant appeared specially by his attorneys, and made this motion on the grounds stated in the last mentioned notice.

Hitchcock, Gifford & Doheny, for the motion.

Chamberlain & Ayres, opposed.

The person served with the complaint was the only one on whom the same could have been served, and there was no other way to serve the complaint.

The service of the complaint in this action was in all respects regular and valid, and a legal service. *Kleecke v. Styles* (3 *Johns*, 249); *Van Pelt v. Boyer* (7 *How. Pr.* 325); *Paine v. McCarthy* (1 *Hun*, 78).

Motion should be denied further on the ground that there is no complaint to set aside, defendant having returned the same as irregular, &c.

MERWIN, J.—The case of *Paine v. McCarthy* (1 *Hun*, 78) is as I read it an authority against the position of the plaintiff. In that case the complaint was served two days after the summons. Judgment was entered by default after the expiration of twenty days from the service of the summons, but before the expiration of twenty days from the service of the complaint. The judgment was held to be regular, no appearance or answer having been put in. This was in effect a holding that the defendant acquired or obtained no rights

Wilson v. Munoz.

on the service of the complaint in that way. If that be so, the plaintiff should not acquire any by such a service. If the plaintiff was not bound by it the defendant should not be. According to section 479 of the Code of Civil Procedure the defendant had twenty days in which to serve a notice of appearance, and demand a copy complaint, which should be served twenty days thereafter.

The return by the defendant of the copy complaint served, does not, I think, preclude the defendant from making this motion, it not appearing that the right of the defendant to so return it, was yielded to on the part of the plaintiff.

Motion granted, costs to abide event.

WILSON v. MUNOZ, AS ADMINISTRATRIX, ETC.

SUPREME COURT, SECOND DEPARTMENT, GENERAL
TERM, FEBRUARY, 1884.

§§ 828, 829.

Evidence.—*Instance of witness, not incompetent in action against administrator.*—*What evidence of interest necessary.*

Where in an action against an administratrix to have a mortgage given to her decedent declared null and void for want of consideration, the plaintiff's husband who was not a party was offered as a witness, and it appeared that he originally owned the mortgaged premises and conveyed them to one "W." who executed the mortgage in question, and thereafter deeded said premises to the plaintiff: —*Held*, that having no interest in the action he was not an incompetent witness; also *Held*, where it was alleged in the answer but not proven on the trial that the consideration for the mortgage was a debt due the deceased from said "W." that a bare

Wilson v. Munoz.

avermment of interest in the answer was not sufficient to establish the fact so as to reject the witness alleged to be interested.
(Decided February, 1884.)

Appeal from judgment in favor of defendant.

This action was brought to cancel and set aside a mortgage upon certain real property belonging to the plaintiff, on the ground that it was given without consideration.

The plaintiff's husband, Michael K. Wilson, on February 2, 1878, executed a deed of the premises covered by the mortgage, in which the plaintiff joined, to one George Wilson, and he on February 6, 1878, conveyed said premises to plaintiff. This deed was not recorded until October 4, 1881, after the death of the defendant's decedent. On October 2, 1879, said George Wilson executed and delivered to the defendant's decedent, Jane Clay, a mortgage on the said premises for \$8,500, which is the mortgage the plaintiff now seeks to have set aside. The defendant's answer avers that the deed from Michael K. Wilson to George Wilson was upon the understanding that the same was to be held for his (Michael's) benefit and remain under his control, but these allegations were not proven on the trial. The plaintiff sought to prove that the mortgage was given without consideration by the testimony of Michael K. Wilson, but the court excluded his evidence of conversations and transactions with the defendant's decedent.

Judgment was rendered in favor of the defendant and the plaintiff took this appeal.

W. B. Maben, for appellant.

S. M. Ostrander, for respondent.

BARNARD, P. J.—When Michael K. Wilson was

Wilson v. Munoz.

offered as a witness by plaintiff, she was presumably the owner of the premises covered by the mortgage she sought to annul.

They had belonged to Michael K. Wilson and he had transferred the same to one George Wilson. George Wilson had conveyed the same to the plaintiff who was wife of Michael K. Wilson. The deed to George Wilson had been duly recorded, but his deed to plaintiff had not been recorded. George Wilson gave the disputed mortgage to Mrs. Clay, defendant's mother. Plaintiff was Mrs. Clay's sole heir. The plaintiff avers that this mortgage was given without any consideration. Michael K. Wilson was a competent witness to prove this fact. He was not a party. The defendant's ancestor did not derive title to the mortgage through the plaintiff or her husband. He had no interest in the action. If he was the agent either of the plaintiff or of Mrs. Clay, he was a competent witness. *Pratt v. Elkins*, 80 *N. Y.* 198. The answer avers that the consideration was a debt of Michael K. Wilson, due to Mrs. Clay, but this was unproven in this case. A bare averment of interest in the answer was not sufficient to establish the fact so as to reject the witness alleged to be interested. The case discloses reasons which might affect the credibility of the witness but none I think to make him incompetent. Judgment reversed and new trial granted, costs to abide event.

Lippincott v. Westray.

LIPPINCOTT, RESPONDENT, v. WESTRAY, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, JANUARY, 1884.

§§. 1342, 2433.

Order.—When properly made by court.—Resettlement of.—What brought up for review by appeal from order denying resettlement.

An appeal from an order denying a resettlement of an order, does not bring up for review the order proposed to be resettled. [1] The only question such an appeal presents is whether or not the appellant was entitled to have had the order he proposed upon his motion for resettlement entered in place of the one that had already been granted. [1, 3]

A motion to set aside an order appointing a receiver in supplementary proceedings in place of one who had resigned is properly made to the court and not to a judge thereof, [2] and on a resettlement of the order entered on the determination of such motion, an order purporting to be made by a judge of the court should not be substituted for one made by the court. [3]

Where it appears upon the papers that a motion was made and heard at the special term, and granted or denied by the special term, there can be no right to enter the decision as an order of a judge of the court. [3]

In such a case if the court had no right to make the order entered, for want of jurisdiction, or otherwise, the error should be corrected by an appeal directly from the order and not by a motion to resettle. [4]

(Decided March 7, 1884.)

Appeal from order of the special term refusing to resettle an order denying motion to set aside an order appointing a substituted receiver in proceedings supplementary to execution.

The opinion states the facts.

J. M. Guiteau, for appellant.

G. W. Van Slyck, for respondent.

Lippincott & Westray.

DAVIS, P. J.—On or about June 17, 1881, application was made upon a judgment recovered by the plaintiff against the defendant, in this court, to the Honorable GEORGE M. VAN HOESEN, a judge of the court of common pleas of the city and county of New York, for an order supplementary to an execution issued on the judgment above named, and such proceedings were thereupon had, that on or about July 19, 1881, the said judge appointed one Samuel B. Speyer as receiver, who qualified and entered upon his duties. Subsequently, and in January, 1883, the said receiver resigned, and applied to the court to be relieved from his position; and thereupon on notice to the defendant's attorney, application was made to a special term of this court, held by Mr. Justice BARRETT for the appointment of another receiver, and an order was accordingly made appointing James L. Butterley, who duly qualified. Afterwards, and on January 27, 1883, with the permission of this court, said Butterley, as receiver, brought an action in the court of common pleas to set aside certain transfers of property alleged to have been made by the defendant to his wife in fraud of his creditors. On October 20, 1883, the defendant made a motion at a special term, held also by Mr. Justice BARRETT, for removal of said Butterley as receiver on the ground of irregularity in his appointment, and on the ground that he was an unsuitable person to have been appointed, because, although an attorney of the court, he was in the employ of the plaintiff's attorney as chief clerk. On the hearing of this motion before the special term, it was denied, and an order denying the same, with costs, was duly entered. The papers do not show that any appeal was taken from that order; but afterwards, and on or about October 31, a motion was made before the same court, held by the same judge, for a resettlement

Lippincott v. Westray.

of the order entered on October 23, which motion was denied, and from this order of denial an appeal is taken.

The appeal from the order denying resettlement ['] does not bring up for review the order proposed to be resettled. The only question such an appeal presents is whether or not the defendant was entitled to have had the order he proposed upon his motion for resettlement entered in place of the one that had already been granted. The amendment proposed to substitute an order purporting to be made by a judge of the court instead of one made by the court, and that such judge denied the motion of the defendant without prejudice to a motion to be made at special term. The court ['] seems to us to have been entirely right in denying that application ; for the motion to set aside the prior order appointing the substituted receiver was properly made to the court, and not to Mr. Justice BARRETT as a judge of the court. The defendant had no right to claim that an order of the judge be substituted for that of the court on such a motion. Irrespective of the merits of the original motion, the substituted or amended order was properly refused.

We do not see that this appeal brings up any other question than that already considered ; and where ['] it appears upon the papers that a motion is made and heard at the special term, and granted or denied by the special term, there can be no right to enter the decision as an order of a judge of the court.

If the court had no right to make the order entered, ['] for want of jurisdiction, or otherwise, the error should have been corrected by an appeal directly from the order entered, and not in the manner taken in this case.

The order refusing resettlement should therefore be affirmed.

BRADY and DANIELS, JJ., concurred.

Straus v. Kreis.

STRAUS v. KREIS.

CITY COURT OF NEW YORK, SPECIAL TERM, JUNE.
1884.

§ 549.

Order of arrest.—When complaint or affidavit stating its contents to be presented on application for.

An order of arrest in an action on contract on the ground that the defendant was guilty of fraud in contracting the liability can be granted only where a complaint, alleging the fraud, or an affidavit setting forth the allegations of the complaint are presented on the application, and the absence of such complaint or affidavit is fatal to the order of arrest.

Lawrence v. Foxwell (4 N. Y. Civ. Pro. 351), followed ; O'Shea v. Kohn (unreported), distinguished.
(Decided June, 1884.)

Motion to vacate order of arrest.

The opinion states sufficient facts.

Wehle & Jordan, for motion.

Jacob Steinhardt, opposed.

HYATT, J.—This is a motion to vacate the order of arrest herein, upon the ground that there was no complaint presented with the motion for the arrest, and that the affidavits did not aver what the allegations of the complaint were.

Although there is no proof before the court that there was no complaint, yet it was conceded upon the argument that there was none.

Subdivision 4 of section 549, Code of Civil Procedure, provides that an order of arrest may issue in an action "on contract, where it is alleged in the com-

Straus v. Kreis.

plaint that the defendant was guilty of a fraud in contracting the liability."

The language of the law is clear and unqualified ; its imperative requirement is, that it must be alleged in the complaint that the defendant was guilty of fraud. This has been directly decided by the general term of the N. Y. superior court, in the case of *Lawrence v. Foxwell*, 4 *N. Y. Civ. Pro.* 351.

The provision is an exceptional one, but it is possible that in view of the notorious fact, that the right to an order of arrest was most frequently abused in cases embraced in subdivision 4, of section 549, Code of Civil Procedure, the legislature determined to require this additional safeguard in this class of cases ; but whatever may have been the motive, the language is free from doubt and the absence of the complaint or of affidavits averring the allegations of the complaint, is fatal to the order of arrest.

I am not unmindful of the case of *O'Shea v. Kohn*, decided at the general term N. Y. supreme court, 1st department, May 29, 1884,* wherein the court affirmed an order denying a motion to vacate an order of arrest.

The learned justice, writing the opinion of the court says, "the motion was made, because of the alleged insufficiency of the affidavits on which the order was founded," and after showing the sufficiency of the affidavits he states that "when the complaint shall be served, allegations containing statements of these facts will set forth a cause of action for the fraudulent purchase of the plaintiff's property, and the right to damages for its value."

Assuming the facts of that case to be similar to those constituting the case at bar, yet it does not appear in the said opinion that the question here at issue

* Unreported.

Remington Paper Co. v. O'Dougherty.

was raised or considered; the sufficiency of the affidavits having been there determined, it would seem that the further statement recited in the opinion was obiter, and whatever may be the natural inference to be drawn therefrom, it cannot bring the decision within the doctrine of *stare decisis*, as applicable to the case at bar.

It follows that the motion will be granted, upon condition, however, that the defendant stipulates not to sue for damages arising out of the order of arrest.

THE REMINGTON PAPER COMPANY, APPELLANT, v. O'DOUGHERTY, RESPONDENT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL TERM, JANUARY, 1884.

§§ 635, 3247.

Attachment—When will not lie—Judgment or statutory liability not contract.

In an action brought against one O'D. to recover costs of a former action awarded to the plaintiff's assignor against one J. P. O'D. the plaintiff in such former action, on the ground that such former action was prosecuted by and for the benefit of said O'D. in the name of said J. P. O'D.: *Held*, that the only ground on which the right to an attachment could rest was that the action was one for the recovery of damages for a breach of contract expressed or implied; that the defendant had made no contract either with the plaintiff or its assignor and there was neither an express nor implied promise; and a warrant of attachment would not lie.

In such a case, the defendant is only liable for costs under the statute to the same extent that she would be if the judgment was against her personally.

The obligation created by a judgment or statute is, in a certain sense, considered as arising from an implied promise, but there is no implied contract in such case.

Remington Paper Co. v. O'Dougherty.

The class of implied contracts arising from the general implication and intendment that every man has engaged to perform what his duty or justice towards another requires, is, *it seems*, the class of implied contracts only to which the statute authorizing the remedy by attachment is intended to apply.

(Decided April, 1884.)

Appeal from an order of the Jefferson special term vacating a warrant of attachment.

The opinion states the facts.

Elon R. Brown, for appellant.

James A. Ward, for respondent.

SMITH, P. J.—The papers on which the attachment was granted allege that the defendant herein, for her own use and benefit and at her own cost, prosecuted an action brought in the name of James P. O'Dougherty as plaintiff against Illustrious Remington and others, as defendants, and that said action resulted in a judgment in favor of the defendants and against the plaintiff therein for the sum of \$459.53 costs. That the said James P. O'Dougherty never had any interest in said action and was, and is, insolvent, and an execution duly issued on said judgment, against his property, has been returned unsatisfied. That the defendants in that action have assigned said judgment and any claim which they have thereon against the said Anna M. O'Dougherty to the plaintiff herein.

It may be conceded that the defendant herein is liable for the costs of the former action, she having prosecuted it in the name of another for her own benefit (*Code Civil Procedure*, § 3247). Nevertheless, we do not think the case is one in which a warrant of attachment will lie. The only ground upon which the right to that remedy can rest, is that the action is one for the recovery of damages for breach of contract,

Remington Paper Co. v. O'Dougherty.

express or implied. *Code Civil Procedure*, § 635. But the defendant has made no contract with the plaintiff or its assignors; she is liable only by the provisions of a statute. There is certainly no express promise; nor is there an implied one. As was said by ALLEN, J., in *McCoun v. N. Y. C. & H. R. R. Co.* (50 *N. Y.* 176, 180). "An implied promise or contract is but an express promise, proved by circumstantial evidence. It is quite distinct from that fiction by which a statute liability has been deemed sufficient to sustain an action of assumpsit, upon the ground that a party subjecting himself to the penalty or other liability imposed by statute has promised to pay it. That feature does not suppose a contract, but simply a promise *ex parte*."

At the most, the defendant is only liable for costs under the statute to the same extent that she would be if the judgment were against her personally. It has been held, repeatedly, that a judgment is no contract, nor can it be considered in the light of a contract; for *judicium redditum in invitum*. *Bidleson v. Whytel*, 3 *Burr.* 1545; *Wyman v. Mitchell*, 1 *Cow.* 316, 321.

In a certain sense, the obligation created by a judgment or a statute, is considered as arising from an implied promise—a promise necessarily implied, as Blackstone expressed it, "by the fundamental constitution of government, to which every man is a contracting party." 3 *Bl. Com.* 159. And upon that ground it was, that under the old form of actions; an action of debt could be maintained upon such an obligation *Id.* But in such cases there is no implied contract between the parties to the action.

Another class of implied contracts arises from the general implication and intendment that every man has engaged to perform what his duty or justice toward another requires. Of that class is the implied promise of one who employs another to work for him, to pay that other what his work deserves. In cases

Haberstich v. Fischer.

of the latter class, the law implies a contract *between the parties*, and to that class of implied contracts, only, in our judgment, is the statute authorizing the remedy by attachment intended to apply.

Order appealed from affirmed with ten dollars costs.

HARDIN, J., and BARKER, J., concurred.

HABERSTICH, APPELLANT, v. FISCHER, RE-
SPONDENT.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM,
APRIL, 1884; ALSO, GENERAL TERM, MAY, 1884.

§ 977.

Notice of trial.—What amounts to waiver of.

Under ordinary circumstances only the party who has noticed a cause for trial can move it for trial.[']

Where the plaintiff in an action appeared in court by his attorney, on a day it was on the calendar and answered ready, and subsequently secured postponements of the case, and endeavored to secure another postponement, which was refused, and a jury directed to be impaneled, and up to this point he made no objection that he had not been served with a notice of trial, *Held*, that he had waived notice of trial and upon the plaintiff's refusal to proceed the court was clearly justified in directing a dismissal of the complaint; that the dismissal was regular and the default could only be opened on terms.

(Decided, at special term, April 26, 1884; at general term, May 30, 1884.)

Motion at New York county special term, to set aside dismissal of complaint.

Haberstich v. Fischer.

The facts are stated in the general term opinion which is reported *post*, immediately after that of the special term.

Henry H. Morange, for motion.

W. H. & D. M. Van Cott, opposed.

BARRETT, J.—There was a waiver of notice of trial. The court acquired jurisdiction by both parties answering ready, and one subsequently securing a postponement without objection as to the notice of trial. The dismissal was regular, and the default can only be opened upon terms, viz. : the term fee, disbursements of dismissal and costs of this motion.

From the order entered on the foregoing decision the plaintiff appealed.

Henry H. Morange, for appellant.

W. H. & D. M. Van Cott, for respondent.

DANIELS, J.—The position taken by the counsel for the plaintiff, that the party only who has noticed a cause for trial can move it for that purpose, is under ordinary circumstances a correct statement of the law (*Code Civ. Pro.* § 977). But this case differs in its controlling circumstances from those in which this legal proposition has been applied. It was first called for trial on Monday, April 17, when it was announced to be ready by the plaintiff's counsel, except that one of his witnesses was not then able to attend. For that reason the trial was postponed until the following Monday, when the cause was again called, and a person representing the plaintiff's counsel, stated him to be unwell. It was then put over until the next day

Haberstich v. Fischer.

with a peremptory direction that it must then be tried. On that day this excuse was repeated and in like manner the case went over to the following day, with the announcement that in case the counsel's disability continued other counsel must be engaged to try the cause on that day. The plaintiff's counsel was on that day in attendance at the court and applied for a further postponement of the trial. This was opposed by the defendant, who was ready to proceed, and a jury was directed to be impaneled. Up to this point no objection appears to have been made that the cause could not be moved for the want of notice from the defendant. But it had been at all times treated as entirely under the control of the court. There was no irregularity, therefore, in impaneling the jury, who were in readiness to hear the cause. The plaintiff's counsel was then directed to proceed, but declined to do so, and the complaint was thereupon dismissed.

The proceeding seems to have been entirely regular. The cause had been specially set down for the day on which it was moved, and no objection was taken to the right of the defendant to move it, and acting upon this apparent acquiescence in his right the jury was drawn. The cause was, then, regularly before them, and as long as the plaintiff's counsel, after that, simply refused to proceed with the trial the court was clearly justified in directing a dismissal of the complaint. It could as well be done then as it could if the plaintiff had endeavored to make out his right to recover by proof and had failed in doing so. The court would not, under such circumstances, be deprived of the power to dismiss the complaint because the defendant had not served notice of trial. The power was equally as complete over the action as soon as the jury had been impaneled and were in readiness to proceed with the trial.

Upon a motion to set aside the dismissal, the court

Estate of Collins.

ordered that to be done on the payment of the costs and disbursements of the term, together with the costs of the motion. This was as favorable a disposition as the plaintiff could reasonably expect, and the order should therefore be affirmed, with the usual costs and disbursements.

DAVIS, P. J., concurred.

ESTATE OF JOHN COLLINS, DECEASED.

SURROGATE'S COURT, KINGS COUNTY, JULY, 1884.

§§ 388, 396, 1819, 2723.

Statute of limitations.—*When proceeding for accounting of executor, etc., not barred by.*—*Laches.*

Where the accounts of an executor or administrator have not been judicially settled, a proceeding by a legatee under the testator's will, to require such executor or administrator to render an account of his proceedings for the purpose of ascertaining the distributive share of such legatee, is not barred by the statute of limitations.

Where a testator died February 16, 1861, and letters testamentary were issued April 1, 1861; an inventory filed July 8, 1861, and a petition for an accounting was filed in 1884 by a devisee, who came of age February 22, 1879, for the purpose of ascertaining her distributive share, and there had not been any settlement of the executor's account,—*Held*, that since section 1819 of the Code of Civil Procedure provides that the right to bring an action to recover such a distributive share is not deemed to accrue until the accounts of the executor or administrator are judicially settled, the proceeding for an accounting was not barred by the statute of limitations,—*Also held*, that the time which had elapsed since the petitioner became of age, was not sufficient to justify a denial of the petition on the ground of laches.

(Decided July 28, 1884.)

Estate of Collins.

Petition by Margaret J. Collins, a devisee under the will of John Collins, deceased, for an accounting by his executors.

Sufficient facts are stated in the opinion.

Man & Parsons, for petitioner.

N. B. Hoxie, opposed.

BERGEN, Surrogate.—This is an application on behalf of Margaret J. Collins, one of the legatees and devisees under the will of John Collins, deceased, requiring the executors under said will to render an account of their proceedings under section 2723 of the Code of Civil Procedure

John Collins died February 16, 1861; letters testamentary were issued April 1, 1861; inventory filed July 8, 1861; Margaret J. Collins was born on February 22, 1858.

The executors answer that the right of this proceeding accrued to the petitioner at the expiration of eighteen months after the issuing of letters testamentary, viz., October 1, 1862, and that by sections 388 and 396 of the Code she was barred from commencing it at the time when she filed the petition in this proceeding.

The executors, therefore, claim that the disability of the petitioner ceased on February 22, 1879, the day she became of age, and that by the third subdivision of section 396 of the Code she was limited to one year after the disability ceased, in which to bring her action.

I think, however, that she is not barred by the statute of limitations. In the case of *House v. Agate*, (3 *Redf.* 307), it was held “that a petition in the surrogate’s court must be filed within the time in which actions of a similar character are required to be com-

Estate of Collins.

menced in courts of common law or equity." The same doctrine was maintained in *Cole v. Terpenning* (25 *Hun*, 482), and other cases therein cited. In *Cole v. Terpenning*, however, the petition for an accounting was denied upon the ground that it was barred by the statute of limitations, but it will be observed that section 1819 of the Code was not in force at the time the petition was filed. Section 1819 of the Code provides: "If after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy or distributive share, the person entitled thereto may maintain such an action against him as the case requires. But for the purpose of computing the time within such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled and not before."

There is no doubt that this is a proceeding to ascertain the distributive share of the petitioner in the testator's estate.

I am, therefore, of the opinion that the last clause of section 1819 of the Code which fixes the time when the right to an action is deemed to have accrued, namely, when the account of the executor or administrator is judicially settled, and that not having been done in this case, disposes of the question of the statute of limitations. As to the question of *laches*, I think the time which has elapsed since the disability of the petitioner ceased is not sufficient for me to refuse to grant the prayer of the petition.

An order may be entered requiring the executors to account.

Estate of Stagg.

ESTATE OF ANNA STAGG, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, JANUARY,
1884.

§§ 388, 2723.

Limitation to proceeding in surrogate's court for accounting.

Where on an application by a residuary legatee for an accounting by an executor, it appeared that the testator died in 1861, and letters testamentary were soon after issued, and that several trusts were created by the will, of which the executor was made trustee, the income of which was to be applied to the use of certain persons, and upon their death the principal paid to others, among whom was the petitioner, and that certain power had been granted to the executor by the will which it did not appear had been exercised,—*Held*, that the right of the petitioner to an accounting was not barred by the statute of limitations and that the executor should be required to account notwithstanding his answer declared that "all the legacies which were payable under the provisions of the will have been paid and the whole estate distributed to those entitled thereto according to said will."

(Decided January 30, 1884.)

Application for an order that an executor file an account of his proceedings.

The facts are stated in the opinion.

ROLLINS, S.—This is a proceeding whereby the residuary legatee of decedent, seeks to obtain an accounting from the surviving executor. Anna Stagg died in 1861, and soon afterward letters testamentary were issued to this respondent as executor, and to Caroline S. Stagg as executrix. The latter died in 1876. The responding executor has interposed an an-

Estate of Stagg.

swer claiming that the petitioner is barred by the statute of limitations from enforcing the claim which he here sets up, and that, even if it be otherwise, his demand for an accounting after the lapse of so many years is unreasonable, and that the surrogate ought, in his discretion, to discountenance it. The answer also declares that "all the legacies which were payable under the provisions of the will have been paid, and the whole estate distributed to those entitled thereto according to said will." It contains no definite statement as to what legacies have been paid nor as to how the estate has been distributed.

Upon examining the record of the will I find that the testatrix created several trusts whereof she made her executor and executrix trustees, directing that the income of those trusts respectively should be applied to the use of a specified person, and that upon the death of such person, the principal should be paid to another. Some of these provisions are in favor of the petitioner. By one of them she is made sole residuary legatee. By the sixteenth clause of the will the executors are "authorized, directed and fully empowered, whenever they may think it most advantageous and prudent so to do, to sell all or any part of my real estate at public or private sale upon such terms as they may deem proper." It does not appear whether or not this power has been exercised. Upon the disclosures of the petition, the answer and the will itself I cannot find that the petitioner's claim is barred by the statute of limitations.

The cases cited by the respondent's counsel simply hold that when the time has arrived, that a legatee has a right to demand the payment of his legacy, the statute of limitations begins to run, and that after the period of limitation has expired the legatee can no longer enforce his claim for the legacy or for an accounting. See *McCartee v. Camel*, 1 *Barb. Ch.* 455 ;

United States Trust Co. v. N. Y., &c. Rw. Co.

Clock v. Chadeague, 10 *Hun*, 97; Clarke v. Ford, 1 *Abb. Ct. Ap. Dec.* 359; Loder v. Hatfield, 71 *N. Y.* 92; Warren v. Paff, 4 *Bradf.* 260.

In the present case, for aught that appears, the petitioner may not yet have become entitled to all that is given her under the will.

I must therefore direct an accounting, unless within ten days the respondent files an amended answer setting up other facts in support of the claim that he is within the protection of the statute of limitations.

UNITED STATES TRUST COMPANY OF NEW
YORK v. THE NEW YORK, WEST SHORE
AND BUFFALO RAILWAY COMPANY,
AND ANOTHER.

SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM,
AUGUST, 1884.

§§ 769, 1810.

Receiver of corporation.—In what district motion for appointment of to be made.—Action to foreclose mortgage.—When party in interest not party to action may apply to court for protection of his interest.

One not a party to an action who is a party in interest, and who may be injuriously affected by an unlawful proceeding in the suit, may apply to the court for that degree of protection which his interests require should be extended to him.^[2] Accordingly *held*, that a person holding bonds of a railway company secured by a mortgage, made to a trustee, could intervene in an action to foreclose it, and although not a party thereto, move to set aside an order appointing receivers on the ground of want of jurisdiction in the judge making it, and for an order appointing a receiver.^[1, 2, 4, 5]

United States Trust Co. v. N. Y., &c. Rw. Co.

In a case where a railway corporation has given a mortgage to a trustee to secure bonds issued by it, the trustee represents the owners and holders of the bonds and must usually be the party in whose name and by whom legal proceedings for their protection and collection should be carried on, but when the trustees become a party to an unlawful proceeding, injurious to the rights of the beneficiaries the latter are empowered to take such action for their own vindication and protection as the necessities of the case seem to require,^[3] and for this purpose it is not necessary that the trustees should be actuated by any improper motive or controlled by any injurious influence, but it is sufficient that he has identified himself with an unlawful proceeding of which the beneficiaries have a just right to complain.^[5, 6]

An order made by a judge having no jurisdiction over the subject contained in it is absolutely inoperative and void, and may be either vacated or disregarded in any other legal proceeding regularly taken in the action in which the order was made.^[11]

Section 769 of the Code of Civil Procedure,—which designates the counties in which motions in actions should be made,—is modified, and so far as it applies to motions for the appointment of receivers of corporations, superseded by Laws of 1883, chap. 378, § 1, which provides where such motions shall be made.^[10]

Section 1 of chapter 378 of the Laws of 1883, which provides that “every application . . . for the appointment of a receiver of a corporation shall be made at a special term of the court held in and for the judicial district in which the principal business office of the corporation was located at the commencement of the action, wherein such receiver is appointed, or in and for a county adjoining such district; and any order appointing a receiver otherwise made shall be void,”^[12] includes every application for the appointment of a receiver of a corporation made after its enactment,^[13] and applies to an action against a corporation to foreclose a mortgage.^[14]

Whether a receiver is designated a receiver of the property of a corporation, or a receiver of a corporation the effect is precisely the same,^[15] and the fact that section 1 of chapter 378 of the Laws of 1883, refers to receivers of corporations, does not prevent its applying to receivers in actions to foreclose mortgages, because they are designated receivers “of the property of a corporation” in section 1810 of the Code of Civil Procedure, which authorizes their appointment.^[15]

Where one named as the receiver of the property of a corporation in an order, void because the judge who made it had not jurisdiction,

 United States Trust Co. v. N. Y., &c. R. Co.

entered upon the discharge of the duties of that office, and it appeared that to discontinue or supercede his employment would be of no benefit, but would cause disturbance, interruption and embarrassment in the management of the affairs and the transaction of the business of the corporation,—*Held*, that a subsequent order lawfully made appointing a receiver, should name him as receiver.^[19]

Westjen v. Vibbard (5 *Hun*, 265);^[6] Brinckerhoff v. Bostwick (88 *N. Y.* 52);^[7] Hawes v. Oakland (104 *U. S.* 450);^[8] Kamp v. Kamp (59 *N. Y.* 212), ^[11] followed. Whitney v. N. Y. & Atlantic R. R. Co. (5 *N. Y. Civ. Pro.* 118);^[10] Wilkinson v. North River Construction Co. (66 *How. Pr.* 423);^[12] Phoenix Foundary & Machine Co. v. Same (6 *N. Y. Civ. Pro.* 106);^[13] Woerishoffer v. Same (6 *Id.* 113);^[14] Attrill v. Rockaway Beach Improvement Co. (25 *Hun*, 376), ^[15] distinguished.

(Decided August 29, 1884.)

Motion by Denis O'Brien, attorney general, and by Warren Currier and James F. Sutton, owners of bonds issued by the railway company, defendant, to vacate and set aside an order appointing Theodore Houston and Horace Russell receivers of the property of said defendant, and for the appointment of one or more receivers thereof.

The facts are stated in the opinion.

William H. Postle, deputy attorney-general, *John L. Hill*, *Frederick R. Coudert* and *William L. Turner*, for the motion.

Stewart & Boardman, *P. B. McLennan* and *C. B. Alexander*, opposed.

DANIELS, J.—The action has been brought to foreclose a mortgage executed and delivered by the railway company, to the United States Trust Company of the city of New York, to secure the issue of bonds to an amount not exceeding the sum, in the aggregate, of \$50,000,000. By the mortgage, all the property at

United States Trust Co. v. N. Y., &c. Rw. Co.

the time when it was given owned by the railway company, and which should afterwards be acquired by it, together with its corporate franchises of every name and nature, relating to its railway, including the franchise to operate it, were mortgaged as security for the payment of the bonds. It was alleged that the railway company had failed to perform certain of the stipulations, or covenants, contained in the mortgage, and that the right to foreclose it had consequently accrued to the plaintiff. And these allegations have not been denied by the railway company.

The railway in part extended through the county of Orange, and that county was accordingly designated as the place of trial of the action, and it was at a special term of this court, held in that county, that a motion was made for the appointment of receivers of the property of the railway company. Upon that motion, which was not opposed—and the attention of the court was not specially directed to its authority in the case—receivers of all the property and franchises of the railway company were appointed, with the ordinary and usual powers and authority vested in receivers in such cases. This order is assailed in this proceeding as having been made without jurisdiction in the court under whose authority it was directed and entered, and it is for that reason that this application has been made to vacate, annul or disregard the order and appoint one or more receivers of the property of the railway company. The attorney general became a party to the application, under the authority of section 7 of chapter 378 of the Laws of 1883. His right to do so has been resisted by the counsel representing the plaintiff, the persons appointed receivers and the defendant, upon the ground that the proceeding was not taken against the defendant as an insolvent corporation, although it is shown to have been insolvent as a matter of fact. It probably will not become neces-

United States Trust Co. v. N. Y., &c. Rw. Co.

sary to determine whether this objection is well founded or not, for the reason that if the attorney general had no authority to intervene under this or any other provision of the statutes, the application has been properly made by and on behalf of two of the persons holding and owing bonds of the railway company secured by the mortgage. Their interests require that they should be protected by proceedings legally sustained, in order to subserve and promote the proper administration and disposition of the property of the corporation, and if the persons named in the order, to which reference has been made, were not legally appointed receivers of the railway company, they have a just ground of complaint; for the administration of such persons, if they have no lawful authority, may be injurious or prejudicial to the interests of the persons holding the bonds of the corporation, and when a party in interest, although not a party to the action, may be injuriously affected by an unlawful proceeding in the suit, he may apply to the court for that degree of protection which his interests require should be extended to him. *Gould v. Mortimer*, 26 *How. Pr.* 167.*

In a case of this description, the trustee in the mortgage represents the owners and holders of the bonds, and must usually be the party in whose name and by whom legal proceedings for their protection and collection should be carried on, but when the trustee, even without any sinister motive, may become a party to an unlawful proceeding injurious to the rights of the beneficiaries, the latter are empowered to take such action for their own vindication as the necessities of the case may seem to require. When the trustee has committed itself, as it did in the present instance, to a proceeding alleged to have

* S. C., 16 *Abb. Pr.* 448.

United States Trust Co. v. N. Y., &c. Rw. Co.

been unlawful and unauthorized, and continues to assert its legal validity, there, if it really be unlawful, a case apparently arises which will justify the intervention in their own behalf of the persons entitled to the benefit and protection of the trust. For this purpose it is not requisite that the trustee should be [5] actuated by any improper motive or controlled by any injurious influence, but it is sufficient that it has identified itself with an unlawful proceeding of which the beneficiaries have a just right to complain, to entitle them to apply in their own behalf to the court for that degree of protection which their legal or equitable interests appear to require.

This subject was considered in *Weetjen v. Vibbard* (5 *Hun*, 265), and it was there held that active [6] participation even in a wrong is not required to make a trustee a party to it, but silent connivance will be sufficient for the purpose, when it may be observed to afford the means of rendering the misconduct of others successful (*Id.* 267). When that may be the fact, and the trustee continues to endeavor to maintain it, there a necessity arises for the beneficiaries themselves to apply in their own behalf for the proper redress which may be afforded by the law.

This general subject was considered in *Brinckerhoff v. Bostwick*, (88 *N. Y.* 52), where it was held [7] that if a corporation itself refused to prosecute, "or if it still remained under the control of the very directors against whom the action should be brought, the stockholders would have a standing in a court of equity to sue in their own names, making the corporation a party defendant" (*Id.* 56). And [8] the same principle is maintained by *Hawes v. Oakland* (104 *U. S.* 450).

If, therefore, the order for the appointment of receivers was made without authority in the court to which the application for it was directed, as it

United States Trust Co. v. N. Y., &c. Rw. Co.

['] resulted from the action of the plaintiff itself, and it still asserts and maintains the regularity of the proceeding, a case seems to be made out by the facts authorizing the owners and holders of the bonds secured by the mortgage and affected by the order to apply to the court for such redress and protection as the circumstances and the law applicable to them require in the case.

It has been further objected that if the motion could be regularly made by or on behalf of these parties, that it should be made within the district in which the action itself is triable, or in an adjoining county, as that is in terms directed by section 769 of the Code of Civil Procedure; and if the application was controlled by this section the objection would certainly be well founded. But this has been answered by the fact that the principal business office of the railway company was located, at the time of the commencement of the action, in the city of New York, and that under section 1 of chapter 378 of the Laws of 1883, the motion could be regularly made there. If this section is applicable to the case, then the motion has been properly made in the first judicial district,

for in the class of cases included in the section it [10] has modified, and to that extent superseded, the direction contained in section 769 of the Code.

Whether the motion has been regularly brought on in the first judicial district must therefore depend upon what is to be considered the true construction of this section of the act of 1883, and that will more appropriately be considered after disposing of another point presented by way of answer to the motion.

If the order was made by a court having no jurisdiction over the subject contained in it, then it is [11] absolutely inoperative and void, and it may be either vacated or disregarded in any other legal proceeding regularly taken in the action. This sub-

United States Trust Co. v. N. Y., &c. Rw. Co.

ject was considered in *Kamp v. Kamp* (59 *N. Y.* 212), where it was held that when the court is entirely without jurisdiction, "the whole proceeding, including the order or judgment, is *coram non judice* and void. One is not bound to appeal from a void order or judgment, but may resist it, and assert its invalidity at all times" (*Id.* 215; *Hall v. U. S. Reflector Co.*, 31 *Hun*, 609, 611).*

If, therefore, this order was made without jurisdiction, and the plaintiff insists, as it does, upon its validity, the applicants have the right to apply, as they have, for the appointment of one or more receivers, notwithstanding the making of the order; and as incidental to and forming part of the application it may be determined, if that is its character, that the order in controversy is void for want of jurisdiction in the tribunal making it.

The point is accordingly presented whether the order must be so regarded, and that presents for consideration the construction which should be given to chapter 378 of the Laws of 1883. If by this act the application for the appointment of receivers should be made in the judicial district in which the principal business office of the railway company was located at the commencement of the action, or in an adjoining county, then this order was made without jurisdiction and it is void; for Orange county, where the order was made, is not an adjoining county of the county of New York, in which the principal business office of the railway company has been located. That is the clear effect of the concluding part of section one of this act. This section is exceedingly broad and general in its terms, as much so, probably, as language was cap-

* Reversing *S. C.*, 4 *N. Y. Civ. Pro.* 148. The decision of the general term was affirmed by the court of appeals, without opinion, May 6, 1884.

United States Trust Co. v. N. Y., &c. Rw. Co.

able of making it. It has been enacted in the following terms :

“Every application hereafter made for the ap-
[’] pointment of a receiver of a corporation shall be made at a special term of the court held in and for the judicial district in which the principal business office of the corporation was located at the commencement of the action wherein such receiver is appointed, or in and for a county adjoining such district ; and any order appointing a receiver, otherwise made, shall be void.”

And it was in express language directed to include every application for the appointment of a re-
[’] ceiver of a corporation, made after its enactment.

This broad language is to be applied and enforced according to the usual understanding and import of the terms made use of, and as they have been subjected to no exception whatever, the court cannot add an exception without usurping the province of the legislature, over which it has no control. Neither can the construction and effect of the terms be limited or restricted by any supposed policy not indicated in the act itself. What the court is required to do, with this as well as other statutes, is to ascertain from the language employed the intention of the legislature, and, when that is ascertained, to carry it into effect, as it may be expressed or indicated by the law. In this instance the legislature has declared the intention to be to include every application, after the passage of the act, made for the appointment of a receiver of a corporation. And this language is so broad and
[’] general as to include an application for the appointment of a receiver in an action for the foreclosure of a mortgage of this description. The power to appoint such a receiver has been expressly given by section 1810 of the Code of Civil Procedure, and without that it was within the acknowledged jurisdiction of

United States Trust Co. v. N. Y., &c. Rw. Co.

this court, as a court of equity (*Hallenbeck v. Donnell*, 94 N. Y. 342).

But by this section of the Code the receiver has been designated as "a receiver of the property of a corporation," and this phraseology has been relied upon as distinguishing the case of such a receiver from "a receiver of a corporation," as the words have been made use of in the act of 1883. But that these are convertible terms, and have been intentionally used as such and require practically the same construction, appears from other provisions contained in the Code of Civil Procedure. For by sections 1784 and 1785, actions have been provided, first, in favor of judgment creditors for sequestrating the property of a corporation and providing for the distribution thereof, and secondly, for the dissolution of a corporation because of its insolvency, or the suspension of its ordinary and lawful business, or its neglect or refusal for one year to discharge its notes or other evidences of debt. And by section 1788 it has been provided that receivers in such actions may be appointed, and the judgment in both classes of cases—when the actions may proceed so far—are practically the same, and must provide for a just and fair distribution of the property of the corporation and the proceeds thereof among its fair and honest creditors (*Code of Civil Procedure*, § 1793). Such receivers as these would very clearly be receivers of the corporation itself, although designated "receivers of the property of the corporation" by section 1788, and they are plainly intended to be within that part of the act of 1883 which follows its fifth section. A like receivership has also been provided in proceedings for the voluntary dissolution of a corporation, and when appointed the officer has been designated as a receiver of its property (*Code*, § 2429).

The language of section 1810 was therefore not selected as being peculiarly appropriate to a receiver

United States Trust Co. v. N. Y., &c. Rw. Co.

appointed in an action for the foreclosure of a mortgage, but as properly descriptive of an officer who should be authorized to take charge of the property of the corporation. If it had been intended by these terms to distinguish such a receiver from a receiver appointed in an action for the dissolution of a corporation or a sequestration of its property under the other provisions of the Code, the same phraseology would not there have been made use of, but language would have been employed which would have distinguished one class of receivers from the other. That was not done, but the phraseology is identical, which is applicable to all classes of corporate receivers provided for by the Code, and they are in general terms designated to be receivers of the property of the corporation, and as usually understood and construed these terms are the mere equivalent of the language employed in the enactment of section 1 of the act of 1883. For when a receiver may be appointed under the authority of this section he will take, by virtue of his appointment, no more than he could under either of the provisions of the Code of Procedure, or than were in terms declared to be vested in the receivers by the order in this action. The object as well as the [19] authority of the receiver of a corporation or of a receiver of the property of a corporation are precisely the same, for the corporation can have no more than can be placed in the custody or under the control of the receiver, than its property, effects and franchises as they have been included in this order. Whether, therefore, the law designates the receiver to be a receiver of the property of a corporation or a receiver of a corporation, as the language has been used in the act of 1883, the effect is precisely the same, and no tangible ground exists for distinguishing the language employed in this statute from that made use of in the Code of Civil Procedure, and no exception is

United States Trust Co. v. N. Y., &c. R. Co

therefore permitted by the act of 1883 from the generality of its provisions, by reason of the circumstance that the receiver in an action of this nature has been designated by the Code as a receiver of the property of the corporation. No restraint or limitation on account of this mere difference of expression can be imposed upon the very comprehensive language of the first section of the act of 1883, but it must be read as it has been expressed by the legislature, to include every application made after its passage for the appointment of a receiver of a corporation or of the property of a corporation, which, in legal effect as well as popular understanding, would be the same thing.

If this receivership should be excluded from section 1 of the act of 1883, because of this difference of expression, all receivers of corporations should to whom it has been applied in the Code, for all are described and designated in the same language. And that would completely nullify this part of that act, and wholly defeat the purpose of the legislature in enacting it. It would leave nothing whatever for it to operate upon; and that courts are not at liberty to do.

It has been urged that the case of *Whitney v. N. Y. [16] & Atlantic R. R. Co.* (5 *N. Y. Cir. Pro.* 118), is at variance with this construction, but in that case the effect of section 8 of chapter 378 of the Laws of 1883, was alone before the court for its consideration, and the terms of that section were then deemed to be inapplicable to a motion for the appointment of a receiver of a corporation in an action for the foreclosure of its mortgage. That construction was deemed proper for the reason that the section itself was framed in such a manner as to include within its language only proceedings for the dissolution of a corporation, or the distribution of its assets, and as the proceeding in this action is controlled by section 1 of the act, which con-

United States Trust Co. v. N. Y., &c. Rw. Co.

tains no such qualification, but is more general in its language, this decision is inapplicable to the present motion.

The sections following section 5 of the act refer in terms to insolvent corporations, but they contain nothing evincing it to be designed by the legislature that the broad language of section 1, and of the others immediately following it, should be subordinated to this restriction. The nature and object of these parts of the act seem to have been intended to be different, for by the provisions contained in the first and the three succeeding sections, all receiverships of corporations have, in express language, been included, while the provisions made by section 6, and those succeeding it to the eleventh section of the act, have been specially framed to meet the cases of insolvent corporations, and to direct what should be the practice in that class of cases. These sections contain no language or intimation restricting the terms or effect of the preceding sections of the act to the same class of corporations, the former providing for receivers of all corporations, and the latter regulating the course of practice to be observed in proceedings taken for the dissolution or distribution of the assets of a corporation. Why this distinction has been made is not explained by any language contained in the act, but that it was intended by the legislature is evident from the very general language of the earlier sections, which have in no manner been qualified or subordinated to the provisions contained in the later sections of the act.

As the application for the appointment of a receiver of the railway company is included within section 1 of the act of 1883, and by it was required to be made in the county of New York, or in an adjoining county, and the order in question was not so made, it is, within the very language of the act, a void order, and

United States Trust Co. v. N. Y., &c. Rv. Co.

cannot stand in the way, therefore, of the success of the present application, even though it may not be in terms proper to formally direct that it should be vacated. It was made without the authority of law, not designedly, of course, but the general language of this section of the act of 1883 was inadvertently overlooked. It is remarkable that such an oversight should have arisen in the proceeding, as it is obvious that the order which was directed and entered conforms in one of its directions to what has been required by section 3 of this act of 1883. It is probable that this oversight arose out of the fact that the proceeding was not a contested one, but the application made by the plaintiff was acquiesced in by the railway company. But such acquiescence could not confer this authority upon the court, when by this act it had been prohibited from exercising it.

The decisions made in *Wilkinson v. North River Construction Co.** and *Phoenix Foundry & Machine*

Co. against the Same† and *Woerishoffer* against [17] the Same,‡ in no manner conflict with the construction here given to the act of 1883, for no different construction of the portions of the act applicable to this proceeding was in any form intimated in either of those decisions. It is also probably needless to add

that the case of *Attrill v. Rockaway Beach Imp. Co.* (25 *Hun*, 376), can have no effect upon the determination of this application, for that decision depended upon the effect to be given to section 769 of the Code, unqualified and unaffected by the act of 1883, or any similar act.

From these considerations, it follows that the application now made for the appointment of one or

* *Oncida Sp. T.*, 66 *Hon. Pr.* 423† Reported, *post*, p. 106.‡ Reported *post*, p. 113.

United States Trust Co. v. N. Y., &c. Rw. Co.

more receivers of the railway company has been regularly made in the first judicial district, and that the order in form providing for that appointment, made in Orange county, presents no legal obstacle in the way of the exercise of this authority.

One of the persons who was designated in the order has not been seriously objected to, and from the known character, standing and position of Judge

RUSSELL, it is very certain that no well founded [19] objection to his capacity or qualifications for

the office of receiver could be made. He has entered upon the discharge of the duties of that office under this void order, and so far has acquainted himself with the affairs and business of the railway company, and there seems, therefore, to be good reason justifying his continuance in that position by a lawful appointment, which may be made under the provisions of this act. To discontinue or supersede his employment in this manner would be of no benefit or advantage to either of the bondholders or the parties to the action, but it would cause disturbance, interruption and embarrassment in the management of the affairs, and the transaction of the business of the railway company, and ought not to be permitted. As the result of a careful consideration of all that has been said by counsel, and stated in the affidavits brought to the attention of the court, Judge RUSSELL should be continued in this office by the order to be made upon this application, and upon the like security as was required in his behalf by Mr. Justice BROWN, who presided in the court in Orange county. As to the other person designated in the order, now considered inoperative, a serious opposition has been made. It is necessary, for the purpose of rendering it successful, that the allegations made against him should be found to be well founded in fact, for no person should be appointed to such a posi-

United States Trust Co. v. N. Y., &c. Rw. Co.

tion whose administration may not receive the confidence of the parties to be affected by it. What has been alleged against him may be entirely without foundation, as it is said to be by Mr. Justice BARNARD in *Currier v. New York, West Shore & Buffalo Railway Co.*,* and while the objections made for that reason would form no good ground for his removal, they might well be entitled still to the effect of preventing his appointment. That, however, it is not necessary now to decide, for as to the additional receiver, who is to be the associate of Judge Russell, the consideration of the case will be deferred until the bondholders and the parties can be more fully heard upon this subject.

The circumstance of an order having been made by the circuit court of the United States in the district of New Jersey, of a similar import and effect to that made in Orange county, has not been deemed important in this case, for that order proceeded no further than to invest these persons with authority over so much of the railway property as was situated in the state of New Jersey and as it followed the order which has been considered to have been unauthorized, it could add nothing whatever to the validity of that order.

The disposition already indicated should be made of this application and it may be proper to add, in conclusion, that in the diversity of the laws enacted to affect the appointment of receiver of corporations and the frequent changes made by the legislature in their provisions any one of the justice's of this court would have been equally as liable to act under a misapprehension of the state of the law, as did Mr. Justice BROWN at the time when the proceeding was brought before him; and, as it was not contested, would have been equally disposed to have acquiesced in the as-

* Unreported.

Phoenix Foundry, &c. Co. v. North River Construction Co.

sumed regularity of what the parties to the action both consented should be done. Still that will not sustain the proceeding, but an order must be made, as already suggested for the appointment of receivers of this corporation to carry into effect the provisions of the mortgage as well as the authority which the law has vested in the court over the subject.

PHOENIX FOUNDRY & MACHINE Co. v. THE NORTH RIVER CONSTRUCTION COMPANY.

SUPREME COURT, ONONDAGA COUNTY, SPECIAL TERM, MARCH, 1884; ALSO, FOURTH DEPARTMENT, GENERAL TERM, APRIL, 1884.

§§ 602 *et seq.*, 769, 1809, 1810.

Motion to vacate order, where made—Order staying proceedings—When not void—Receiver—Power of supreme court to appoint, of insolvent foreign corporation—Power to restrain actions and interference with property when receiver has been appointed—Effect of insufficient service of injunction order.

A motion to vacate an injunction order granted in an action in the supreme court first judicial district of which the court had jurisdiction, upon notice, must be made in the judicial district in which the action is triable.*[¹, ¹¹, ¹⁶]

An order restraining or staying actions is not void because too broad, and a party may not disregard such an order simply because it is too broad or extensive.[¹⁵]

In an action by a stockholder of a foreign corporation which was insolvent, and of which a receiver had been appointed in the state under whose laws it was organized for the appointment of a receiver of its property in this state, the supreme court has power to appoint a receiver.[³, ¹⁰] Such receiver represents the corporation, its stockholders and its creditors, and the court appointing him

* To same effect is *Smith v. Danzig*, 3 N. Y. Civ. Pro. 137.

Phoenix Foundry, &c. Co. v. North River Construction Co.

has authority, as an incident to the power of appointment to prevent any interference with the assets of the corporation by individual creditors or others, in order to preserve the fund for distribution, [⁴, ¹⁰] which authority may be exercised by an order in the suit in which the receiver is appointed.^[5] Such an order is made in the exercise of the inherent power of the supreme court to protect its receiver and the funds in his hands, and is not a creature of the Code.^[6] and is not subject to every provision of the statute or of the rules of court which apply to the injunction orders granted upon the application of a party for the protection of his individual rights.^[5] Accordingly *held*, that the provisions of the Code and rules, requiring an undertaking to be given on obtaining an injunction order and that the order shall state the grounds in which it is granted do not apply to such an order.^[8]

The fact that the mode of service of an injunction order was insufficient does not warrant the vacating of the order.^[9]

Wilkinson v. North River Construction Co. (66 *How. Pr.* 423);^[2] *Attorney-general v. Guardian Mutual Life Ins. Co.* (77 *N. Y.* 272);^{[4}, ¹⁰] *Erie R. R. Co. v. Ramsey* (45 *Id.* 637);^[7] *Reims v. Astor Fire Ins. Co.* (59 *Id.* 148);^[11] *Atrill v. Rockaway Beach Imp. Co.* (25 *Hun.* 376)^[12] followed: *Walsh v. Stearn* (12 *N. Y. Weekly Dig.* 424);^[13] *Perry v. Seward* (6 *Abb. Pr.* 327), ^[14] distinguished.

(*Decided at Special Term March, 1884; at General Term, May, 1884.*)

Motion by plaintiff at Onondaga County special term to vacate an order made in another action in New York county.

The defendant is a foreign corporation created by and under the laws of the State of New Jersey but having a place for the transaction of business and a fiscal agency in the city of New York. On January 14, 1884, one Charles F. Woerishoffer, a stockholder of the defendant, brought an action against this defendant in this court, in the county of New York, for the benefit of himself and all other stockholders, and of the creditors of the defendant, alleging in his complaint the insolvency of the defendant, and that a receiver of its effects had been duly appointed by a

Phoenix Foundry, &c. Co. v. North River Construction Co.

court of competent jurisdiction in New Jersey, and asking for the appointment of a receiver of the property of the defendant in this state. By an order made at a special term of this court held in New York County (the first district), January 14, 1884, appointing the New Jersey receiver, Ashbel Green, receiver of all the property and assets of the company in this state. Thereafter, on January 19, 1884, this action was begun to recover on contract for merchandise sold to and work done for the defendant, Onondaga county being named in the summons and complaint as the place of trial. Subsequently the order which the plaintiff herein seeks to have vacated was granted upon notice in the aforesaid action brought by Woerishoffer, by special term of the court in New York county, restraining all persons "from bringing or prosecuting any suits or proceedings against the defendant, The North River Construction Company, or in any manner interfering with the assets of said defendant until the further order of the court."

William S. Andrews (Knapp, Nottingham & Andrews, attorneys), for the motion.

C. B. Alexander, opposed.

VANN, J.—The plaintiff in this action moves at a special term sitting in the fifth judicial district to [1] vacate an order made in another action by a special term sitting in the first district. 4

This is expressly prohibited by section 769 of the Code of Civil Procedure. The learned counsel for the plaintiff has argued with much force that the order in question is void because it was issued without any authority. If it is void this motion is unnecessary; [2] but after careful deliberation I have held it to be

Phoenix Foundry, &c. Co. v. North River Construction Co.

valid in the case of *Wilkinson v. The North River Construction Company*,* and for my reasons must refer to the opinion in that case. As this motion cannot be made outside of the judicial district in which the order complained of was made, none of the other questions argued by counsel have been considered.

Ten dollars costs.

From the order entered on this decision the plaintiff appealed to the general term.

William S. Andrews (Knapp, Nottingham & Andrews, attorneys), for appellant.

C. B. Alexander, for respondent.

SMITH, P. J.—The object of the action brought by the stockholder Woerishoffer, and of that to which it is ancillary, is to wind up the affairs of the insolvent corporation, and make an equitable distribution of its assets among all its creditors. The receiver appointed in those actions represents the corporation, its stockholders, and its creditors, and the court by which he was appointed had authority, as an incident to the power of appointment, to prevent any interference with the assets of the corporation by individual creditors or others, in order to preserve the fund for distribution (*In re Attorney-General v. The Guardian Mutual Life Insurance Company*, 77 N. Y. 272).

Such authority may be exercised by an order made in the suit in which the receiver is appointed (*Id.*). An order of that nature, being for the protection of the fund which the court has in its possession through its receiver, is not subject to every provision of the statute, and of the rules of court which

* 66 How. Pr. 423.

Phoenix Foundry, &c. Co. v. North River Construction Co.

apply to the injunction orders granted upon the application of a party for the protection of his individual rights. It is properly made in the action in which the receiver is appointed, and a creditor who attempts to interfere with the fund by unnecessarily subjecting it to the costs of an action to enforce his claim, cannot set up that the order is ineffectual as to him because not made in his own action. If there are controversies to be litigated, or accounts to be adjusted between such creditors and the corporation, all can be done on the investigation of the claim in the winding-up suit, and the creditor is a party to that suit through his representative, the receiver.

In short, the order is made in the exercise of the ['] inherent power of this court to protect its receiver and the funds in his hand, and is not a creature of the Code (2 *Story's Eq. Jur.* § 891). This power is recognized by section 1806 of the Code in the classes of actions therein referred to, in which, however, the present action is not included, but that section is simply declaratory of the common law as far as it goes, and does not divest the court of its power in cases not within its provisions.

That this court has the power, by an order made ['] in one action, to restrain proceedings in another pending before it, was held in *Erie R. R. Co. v. Ramsey* (45 *N. Y.* 637), overruling the case of *Schell v. Erie R. Co.* (51 *Barb.* 368), cited by the appellant's counsel. True, the power is to be exercised in extreme cases only, but here is a case in which its exercise is necessary for the equal protection of all the creditors of the insolvent corporation, including the creditor whose action is stayed by it.

If these views are correct, it results that none of ['] the objections urged by the appellant's counsel are tenable. As we have seen already, the order is valid, although not made in the action brought by

Phoenix Foundry, &c. Co. v. North River Construction Co.

the present plaintiff. And the provisions requiring an undertaking to be given on obtaining an injunction order, and that the order shall state the grounds on which it is granted, do not apply to an order like the one in hand.

If the mode of service was insufficient, it does [°] not warrant the vacating of the order; whether it would authorize proceedings against the plaintiff for a contempt in case of disobedience of the order is a question not involved in this appeal.

The order should be affirmed, with ten dollars costs and disbursements.

HARDIN, J.—[Concurring.]—In the Woerishoffer action against the North River Construction Company, the court acquired jurisdiction of the defendant, [°] and had power to appoint a receiver. The receiver so appointed represents all the creditors, and as ANDREWS, J., says in *Attorney-General v. Guardian Mutual Life Ins. Co.*, 77 *N. Y.* 272, “they are subject to the summary jurisdiction of the court in matters pertaining to the administration of the estate of the insolvent corporation. The court at special term in New York had power to make the order staying proceedings against the insolvent corporation.” If that stay order was improperly granted, or if reasons exist why it should be vacated or modified *quoad* the plaintiff in this action, the reasons should be presented to the court in the district wherein the stay order was made.” If the plaintiff is entitled to such remedy, it “must be sought by application [1] to the court in the district in which the receiver was appointed, and in the action in which the appointment was made.” ANDREWS, J., in *Reims v. Astor Fire Ins. Co.* (59 *N. Y.* 148), used the language just quoted. Besides, it is provided by section 769 of the Code of Civil Procedure, viz.: “A motion

Phoenix Foundry, &c. Co. v. North River Construction Co.

upon notice in an action in the supreme court must be made within the judicial district in which the action is triable."

The same position we have already stated was asserted by the court in the first department in [12] 1881 in deciding *Attrill v. Rockaway Beach Imp. Co.*, reported in 25 *Hun*, 378.

If the order was irregular, because obtained without complying with section 610 of the Code or Rule 13 without reciting the grounds upon which it was granted, the remedy was by motion in the district wherein it was made. Section 769 of the Code was [13] not referred to in *Walsh v. Stearn* (12 *N. Y. Week. Dig.* 424), and the court incidentally remarked that

"the legal effect of the order was to remove an illegal restraint and it had no other effect." We do not regard that authority as applicable here, but if a full examination of that case should present the point involved and a holding adverse to the views we have stated, we should be constrained to disregard it, and

follow cases we have hereinbefore cited. *Perry v. Seward* (6 *Abb. Pr.* 327), is not applicable; it was decided in 1858, long before the enactment of section 769, and the motion was made in all the actions, and was a motion to consolidate all the actions; and it was made in the county "in which all the parties resided" and actions "were all triable in Albany county" where the motion was made. If the order restraining or staying actions is too broad, it is not [14] therefor void and a party may not disregard the order simply because it is too broad or extensive (*People v. Pendleton*, 64 *N. Y.* 622; *People v. Sturtevant*, 9 *Id.* 263).

We think the plaintiff must seek his remedy, [15] if he wishes to assert it, in the lifetime of the order complained of, in the action pending in the first district (*Wilkinson v. This Defendant*, 66 *How. Pr.*

Woerishoffer v. North River Construction Co.

423; Attorney General v. North Am. Life Ins. Co., 6 Abb. N. C. 293; S. C., 56 How. Pr. 160; Attorney General v. Guardian Mut'l Life Ins. Co., 77 N. Y. 272).*

This order should be affirmed, with \$10 costs and disbursements.

BARKER, J., concurred.

WOERISHOFFER v. THE NORTH RIVER CONSTRUCTION COMPANY.

SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM,
JUNE, 1884.

§§ 1809, 1810.

Receiver.—Power of supreme court to entertain action for appointment of, of foreign corporation.—Notice to attorney general.—Injunction, restraining actions, etc.—When vacated as to attacking creditors.

Under section 1810 of the Code of Civil Procedure, the supreme court has power to entertain an action brought by a stockholder of a corporation organized under the laws of New Jersey for the appointment of a receiver of its property in this state on the ground that it was insolvent and that a receiver of its effects had been appointed by a court of competent jurisdiction in New Jersey, and to appoint a receiver of the property of the defendant therein.¹

The provisions of chapter 378 of the Laws of 1883, requiring notice to the attorney general of a motion for a receiver of a corporation, do not apply to the appointment of an auxiliary receiver of a foreign corporation.^[2, 3]

Where after certain creditors of a foreign corporation had levied attachments of its property, an ancillary receiver of it was appointed in this state,—*Held*, that the appointment of a receiver

* See *People ex rel. Negus v. Dwyer*, 2 N. Y. Civ. Pro. 379 (387).

Woerishoffer v. North River Construction Co.

could not divest them of the rights they had acquired and that they should be allowed to proceed and perfect their judgment and realize what they could out of the property ; that an order restraining all persons from bringing or prosecuting any suit or proceeding against the defendant or interfering with its assets should be vacated as to such creditors.[⁴]

Phoenix Foundry & Machine Co. v. North River Construction Co.
(6 N. Y. Civ. Pro. 106), approved.[³]

(Decided June 23, 1884.)

Motion by certain attachment creditors of the defendant to dissolve an injunction granted herein.

The defendant is a foreign corporation organized by and under the laws of the state of New Jersey. The plaintiff is one of its stockholders and as such brought this action in behalf of himself and all other stockholders and creditors of the defendant, for the appointment of a receiver of the property of the defendant in this state, on the ground that it was insolvent, and that a receiver of its property and effects had been appointed by a court of competent jurisdiction in New Jersey.

July 14, 1884, on notice, an order was made at a special term of this court in New York county appointing Ashbel Green ancillary receiver of the property of the corporation. Thereafter an order was granted enjoining and restraining all persons "from bringing or prosecuting any suits or proceedings against the defendant . . . or in any manner interfering with the assets of the defendant until the further order of the court." That order is the one which certain creditors who had attached the property of the defendant before the appointment of the ancillary receiver, now seek to have vacated.

George E. Comstock, F. N. Bangs, F. L. Stelston, John L. Hill and M. A. Knapp, for the motion.

Woerishoffer v. North River Construction Co.

John E. Parsons, and C. B. Alexander, for plaintiff, opposed.

William M. Evarts, for the receiver, opposed.

Howard Mansfield, for the defendant, opposed.

VAN BRUNT, J.—Under section 1810 of the [] Code, the court evidently had the power to entertain this action and to appoint a receiver of the property of the defendant therein.

By reason of the injunction granted by the court in New Jersey, the domicil of the corporation, the officers and the agent of the corporation of which that court had jurisdiction were enjoined from interfering with the property of the corporation, and this injunction operated upon such officers personally, no matter where the property of the company was situated. The appointment of a receiver in the state of New Jersey operated only upon property within that state, and therefore as to the assets of the corporation within this state, there was no officer empowered to hold the same.

As to the objection that under chapter 378 of the Laws of 1883 the appointment of the receiver in this action was void because of the want of notice to the attorney general, it does not seem to be well taken. The reason for the enactment of the law must necessarily be considered in determining the scope of the act.

By this provision requiring notice to the attorney general it was intended to prevent the improvident appointment of receivers by the court upon the motion of parties who were thereby endeavoring to further their own private schemes rather than attempting to preserve the assets of a corporation for its creditors. This restraint upon the appointment of a []

Woerishoffer v. North River Construction Co.

receiver could not in the slightest degree apply to the appointment of an auxiliary receiver of a foreign corporation. In such a case the necessity for, and the right to a receiver have been adjudicated upon by the courts of the state where the corporation is domiciled.

Whatever evil would result from the appointment of a receiver has already been inflicted, and the intervention of the courts of this state is merely to preserve the property of the corporation within this state for equal distribution among the creditors of the corporation ; such receiver being, in my judgment, bound to account in this state for all property within this state at the time of his appointment.

The appointment of such auxiliary receiver being to preserve the assets of the corporation for distribution among its creditors equally, and not for the purpose of allowing such assets to be removed by the receiver to a foreign jurisdiction and compelling the creditors within this state to go to a foreign jurisdiction to prove their claims against assets which they might have reached by action in this state but for the appointment of the receiver. The injustice which would flow from a different construction of the right

of domestic creditors is too manifest to need argument. I am of the opinion, therefore, that the act of 1883 does not apply to auxiliary receivers, as such receivers are neither within the letter nor spirit of the act.

The further objection is raised to the continuance of the injunction, that the court had no power to grant the same. This question seems to have been decided by the general term, fourth department, in the case of Phoenix Foundry and Machine Co. v. North River Construction Co.,* and I concur in

* Ante, p. 106.

Phelps v. Phelps.

the views expressed by presiding Justice SMITH in his opinion.

As to creditors who have attachments which have been levied upon assets of the corporation prior to the appointment of the ancillary receiver, they should be allowed to proceed and perfect their judgment and realize what they can out of the property levied upon, as the appointment of a receiver could not divest them of rights they acquired. The motion to dissolve the injunction as to the attaching creditors must be granted.

PHELPS v. PHELPS.

SUPREME COURT, HERKIMER COUNTY, SPECIAL TERM,
NOVEMBER, 1883.

§§ 424, 439, 528, 844.

Affidavit.—Certificate to, taken without the state.—Effect of failure of, on order for publication.—Appearance.—What amounts to.

Where the affidavit and complaint on which an order for publication was granted were sworn to without this state and were not certified in the manner required to entitle a deed so acknowledged to be recorded in this state,—*Held*, that the papers were to be regarded as unverified,* and that, so regarded, they failed to give the court or officer any jurisdiction of the case, and the order for publication and the proceedings thereunder were without authority and void; that no subsequent laches of the defendant could give jurisdiction.

When on a motion by a defendant to set aside the service of a summons by publication and all proceedings thereunder, his attorneys

* See *Williams v. Waddell*, 5 *N. Y. Civ. Pro.* 191; *Harris v. Durkee*, 5 *Id.* 376; *Code Civil Procedure*, 528. It seems, that proof of the laws of the state in which the affidavit was taken, empowering the officer taking it to do so, and if his signature may be substituted for the certificate. *Vide Williams v. Waddell, supra.*

Phelps v. Phelps.

indorse their names on the motion papers as attorneys for the defendant,—*Held*, that this was an appearance in the action sufficient to give the court jurisdiction of the case and of the person of the defendant.

(*Decided November 12, 1883.*)

Motion by defendant to vacate and set aside an order for the publication of the summons herein and all proceedings thereunder.

This is an action for absolute divorce. The summons was served by publication in 1878 and judgment taken on the defendant's failure to appear or answer in January, 1879.

The order for publication was granted on a complaint verified without the state before a clerk of the supreme court of Maine accompanied by a certificate purporting to be signed by one Appleby, who described himself as chief justice of the state of Maine, certifying that the person who took the affidavit was the proper person to make out and certify copies of all records and proceedings of the supreme judicial court, holden within and for the county of Knox, in the state of Maine, and that full faith and credit should be given to his acts and attestations.

In November, 1883, the defendant made this motion.

Louis Marshal, for the motion.

The verification was a nullity, and the complaint must be treated as unverified. *Ladd v. Terre Haute, &c., R. R. Co.*, 13 *N. Y. Weekly Dig.* 209; *Luther v. Brison*, 4 *N. Y. Monthly Law Bul.* 91. . . . The objections . . . are directed to the jurisdiction of the court and are not merely irregularities, and cannot be amended or overcome by any claim of laches. *Kendall v. Washburn*, 14 *How. Pr.* 380; *Titus v. Relyea*, 16 *Id.* 371.

Phelps v. Phelps.

William H. King, opposed.

The complaint was properly verified. *Code of Civil Procedure*, §§ 525, 526, 844.

CHURCHILL, J.—The order of publication of the summons in this action was made by the county judge of Montgomery county, November 12, 1878, and was made upon a complaint and affidavit purporting to have been verified by the plaintiff in the state of Maine, on August 3, 1878. Prior to that time the law relating to the taking of affidavits in other states to be used in this state as it existed before the Code of Civil Procedure (2 *R. S.* 396; § 25, and Laws of 1869, chap. 133), had been repealed (chap. 417, Laws of 1877, § 1, sub. 3 [6], and subdiv. 4 [43]), leaving in force after September 1, 1877, section 844 of the Code of Civil Procedure, to govern the taking of such affidavits. By that section an affidavit taken in another state to be used in this state, must be taken before an officer authorized by the laws of the foreign state to take and certify the acknowledgment and proof of deeds to be recorded in that state, and that he was such officer and so authorized (Laws of 1869, chap. 557), must be certified in the manner required to entitle a deed acknowledged before him to be recorded in this state. In the affidavits presented to the county judge there is an entire failure (so far as the papers show), to comply with these requirements of the Code, and the papers are to be regarded as unverified by the plaintiff; so regarded they fail to give the courts or officer any jurisdiction of the case, and the order of publication and the proceedings subsequent thereto to judgment are without authority and void. *Code*, § 439. If the affidavit in question failed to give jurisdiction no subsequent laches of the defendant could give such jurisdiction. *Titus v. Relyea*, 16 *How. Pr.* 371.

The defendant's attorneys have indorsed their

Phelps v. Phelps.

names upon the motion papers served by them in this case as attorneys for the defendant, which is an appearance in the action, and is sufficient to give the court jurisdiction of the case and of the person of the defendant. *Code Civil Pro.* § 424; *Mahoney v. Penman*, 4 *Duer*, 603 (605).*

An order should be entered vacating and setting aside the judgment of divorce heretofore entered in this action, and giving to the defendant 20 days after the entry of the order to be entered herein in which to make and serve a demand of a copy of the complaint of the plaintiff in this action, the proceedings subsequent thereto to be the same as though personal service of the summons had been made upon the defendant.

Let an order in accordance with the foregoing be drawn, and filed and entered in Montgomery county, and let the papers used on the motion also be filed in that county.†

* See on this subject *Douglass v. Haberstro*, 8 *Abb. N. C.* 230; *S. C.*, 58 *How. Pr.* 276; *Couch v. Mullane*, 63 *How. Pr.* 79; *Krause v. Averill*, 4 *N. Y. Civ. Pro.* 410; *Code of Civil Procedure*, § 421.

† This case was, on appeal, affirmed by general term of the third department, see 32 *Hun*, 642.

De Silver v. Holden.

DE SILVER, RESPONDENT, v. HOLDEN, APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM, MARCH,
1884.

§§ 484, 1316.

Appeal from final judgment on overruling demurrer.—Joinder causes of action.—False representations and conversion.—Pleading.—Damages.—Intent.

Upon an appeal from a judgment entered upon an assessment of plaintiff's damages, after a demurrer to the complaint had been overruled and final judgment ordered for plaintiff, the correctness of the order overruling the demurrer is involved.[¹]

A cause of action that by false and fraudulent representations, defendant had induced plaintiff to sign a bond for the payment of money secured by mortgage on plaintiff's real estate, which at defendant's request were made to a third person, to whom defendant delivered them, receiving a specified sum therefor, may be joined under subd. 6, § 487, of the Code, with a cause of action for the conversion of plaintiff's property by defendant. Both causes of action are for injury to personal property.[²]

After execution and before delivery of the bond, plaintiff had a property therein, and the complaint alleges that defendant by false pretenses obtained the bond, which was as much an injury to property as a tortious taking and a conversion thereof.[³]

A special allegation of damage in such case is not necessary; the presumption that plaintiff will be obliged to pay the bond is enough.[⁴]

An averment that with intent to deceive and defraud plaintiff, defendant falsely and fraudulently stated and represented certain matters of fact as to his own financial condition, and as to property owned by him, etc., implies that defendant knew the representations to be false when he made them.[⁴]

(Decided April 7, 1884.)

Appeal from a final judgment in favor of plaintiff, entered upon an order and interlocutory judgment overruling defendant's demurrer to the complaint, which was on two grounds: 1. That causes of action

De Silver v. Holden.

are improperly united. 2. That the allegations as to the first alleged cause of action are insufficient, &c.

The facts appear in the opinion.

E. P. Wilder, for appellant.

I. The causes of action are improperly united (*Code*, § 488, subd. 7). The first is for damages for obtaining a bond and mortgage upon real property by false and fraudulent representations. The second is for failing to return a chattel after demand. The first relates to a supposed injury to real property as an impairment of plaintiff's title; the second relates to personal property, but in no manner alleges "injury" to it. But assuming that the conversion of a chattel is in law an "injury" to personal property, fraudulent representations whereby a plaintiff was induced to execute a bond and mortgage not yet due nor payable, and by reason whereof plaintiff has not yet suffered loss, are not an injury to personal "property" (§ 3343, subd 10). Conversion, wrongful detention, and an action for accounting cannot be united (*Thompson v. St. Nicholas Bank*, 61 *How.* 163). Nor can a cause of action for malicious prosecution be united with one for false imprisonment (*Nebenzahl v. Townsend*, 61 *How.* 353). Nor a cause of action for an assault with one for slander, although the slander and assault were simultaneous (See also *Furniss v. Brown*, 8 *How.* 191; *Colvell v. N. Y. & E. R. R. Co.*, 9 *How.* 212; *Ehle v. Huller*, 10 *Abb. Pr.* 287; *Maxwell v. Farman*, 7 *How.* 236; *Flynn v. Bailey*, 50 *Barb.* 73; *McDonald v. Kountze*, 58 *How.* 152; *Hunter v. Powell*, 15 *Id.* 221; *Cobb v. Dows*, 9 *Barb.* 230; *Anderson v. Hill*, 53 *Id.* 238).

II. The first cause of action does not set forth facts sufficient to constitute a cause of action. It does not appear that plaintiff will ever be called upon to pay her bond or redeem her mortgage. They are not yet

De Silver v. Holden.

due. *Non constat*, but the defendant will do his whole duty in that behalf. In a civil action for fraud and deceit, damage is as essential to the action as fraud (*Aberdeen v. Blackman*, 6 *Hill*, 324; *Gilbert v. Wiman*, 1 *Comst.* 550; *Wright v. Whiting*, 40 *Barb.* 235). The complaint does not allege that defendant knew his representations to be false when he made them. *Non constat*, but he honestly believed them to be true (*Moore v. Noble*, 53 *Barb.* 425; *Robinson v. Flint*, 56 *Id.* 100; *Van Vliet v. McLean*, 23 *Hun*, 206).

C. Bainbridge Smith, for respondent.

I. The causes of action are properly joined, and fall within the provisions of the Code termed "For injuries to personal property" (*Code Civ. Pro.* § 484, subd. 6; *Cleveland v. Barrows*, 59 *Barb.* 364; *Lovett v. Pell*, 22 *Wend.* 369).

II. The maker of a negotiable promissory note can maintain an action for its conversion (*Decker v. Matthews*, 12 *N. Y.* 313; *Develin v. Coleman*, 50 *Id.* 531), and the plaintiff is entitled to recover the amount of the note as damages for its conversion without averring or proving that he has paid it to the holder (*Id.*)

III. The plaintiff will have to pay the bond and mortgage. The mortgagee paid the money on it in good faith (*Aikin v. Morris*, 2 *Barb. Ch.* 140).

SEDGWICK, Ch. J.—The judgment appealed from was entered upon an assessment of plaintiff's damages after a demurrer to the complaint had been overruled and final judgment ordered for plaintiff.

The appeal involves the correctness of the order overruling the demurrer. The demurrer was placed upon two grounds; first, that causes of action were improperly joined; and second, that the allegations of the first alleged cause of action are not sufficient to constitute a cause of action.

De Silver v. Holden.

The first alleged cause of action was, that by false and fraudulent representations, the defendant had induced the plaintiff to sign a bond conditioned for the payment of \$1,700, and also a mortgage upon plaintiff's real estate, to secure the payment of the bonds which were made to a third person by defendant's request, to whom defendant delivered them, receiving therefor from the third person \$1,700. The other alleged cause of action was for the conversion of personal property belonging to plaintiff.

The appellant's counsel argues that the joinder is not justified by the Code, unless by subdivision 6 of the 484th section, that provides that the plaintiff may unite causes of action for injuries to personal property. The further claim is, that the first cause of action is not for an injury to personal property.

Cleveland v. Barrows (59 Barb. 374), satisfactorily decides this point. The opinion is, "Fraud is a wrong, and if a party thereby obtains from another, property, it is an injury to the property of such other in the same sense precisely as though the wrongdoer had taken the property tortiously and converted it. The

[?] bond signed by the plaintiff was her property, and the complaint alleges that the defendant obtained it from her by false pretences. This only affected personal property, for the mortgage which affected the real property was distinct and different from the bond. That she had a property in the bond

after she signed, and before it was delivered to the [?] obligee by the defendant, is shown by *Decker v. Matthews* (12 N. Y. 313), and the cases which have followed it. There was therefore no misjoinder of causes of action.

The important objection to the sufficiency of the allegation to form a statement of a cause of action is, that the complaint does not aver directly that the defendant knew that the representations he made were

De Silver v. Holden.

false. But if the allegations imply that he knew they were false, it seems to be enough, under the case ['] of *Marie v. Garrison* (83 *N. Y.* 28). It was said in that case, "Bearing in mind that what is implied in an averment, is on demurrer to be taken as if the thing implied is directly averred, and that an argumentative pleading is not for that reason demurrable, we conclude, although not without some hesitation, that an averment of refusal to exchange does import that the other party offered to do that without which no exchange could be effected, viz., that he tendered the property or thing which was the consideration of that which he was to receive, and which he called on the other party to deliver."

The complaint avers that with intent to deceive and defraud this plaintiff, the defendant falsely and fraudulently stated and represented certain matters of fact as to his own financial condition and as to property owned by him. These were things that the law would presume were within his knowledge. Such averments imply a charge that the defendant knew the representations to have been false, or that he knowingly made them.

There is another objection, that the complaint does not show, that the plaintiff was or will be damaged by the fact of the bond being delivered to the third person after having been obtained by the defendant. On the facts stated there is a liability upon the bond ['] by the plaintiff to the third person, and a presumption that she will be obliged to pay, and no presumption that the defendant will indemnify her, after he has been guilty of the tort charged. Again, there are some damages, and the assessment of them is not under review.

Judgment affirmed with costs.

O'GORMAN, J., concurred.

Walsh v. Schulz.

WALSH, APPELLANT, v. SCHULZ, IMPEADED, ETC.,
RESPONDENT.

N. Y. COMMON PLEAS, GENERAL TERM, NOVEMBER,
1883.

§ 3191.

Discretionary orders of city court of New York, appeals from.—Relation of court of common pleas and city court.

The court of common pleas will not review a discretionary order of the city court, and there is nothing in section 3191 Code Civ. Pro., or the amendments thereof, which makes it incumbent upon the court to entertain such appeals.

The court of common pleas holds the same position with respect to the city court, that the court of appeals holds with respect to the supreme court and the superior city courts.

(Decided May 22, 1884.)

Appeal from an order of the city court, general term, affirming an order made by Mr. Justice McADAM opening a judgment entered by default.

E. H. Benn, for appellant.

Charles Wehle, for respondent.

VAN HOESEN, J.—The language of section 3191 differs in some particulars from that of section 190, but the differences do not affect the matters under consideration. It is well settled that with respect to the marine court, that the court of common pleas occupies the same position that the court of appeals holds with respect to the supreme court and the superior city courts. The rules that govern the court of appeals in passing upon appeals from the supreme and the su-

Walsh v. Schulz.

perior city courts are applicable to the court of common pleas. This has been universally understood since the decision in *McEleere v. Little* (8 *Daly*, 167) and *Schwartz v. Oppold* (74 *N. Y.* 307). If, therefore, we ascertain the course that would be taken by the court of appeals, if this appeal was before it, we shall have a guide to the decision of the question before us.

The case of *Lawrence v. Farley* (73 *N. Y.* 187), is conclusive upon the point that the court of appeals will not review the discretion of a court of original jurisdiction. In the case cited, a judgment by default was entered against the defendant in 1862. In 1874 a judgment for a deficiency was docketed against the defendant, and more than two years afterward the defendant applied for the opening of the judgment, and gave excuses for suffering the default that were satisfactory for the supreme court, which opened the judgment and allowed the defendant to interpose an answer. From this order an appeal was taken to the court of appeals, which dismissed the appeal on the ground that the order was discretionary, and that the court of appeals being a tribunal created for the examination of questions of law (save in a few cases specially provided for), ought to refrain from matters of discretion which are likely to involve intricate controversies respecting matters of fact. To the same effect are *Howell v. Mills* (53 *N. Y.* 331); and *Alling v. Fahy* (70 *Id.* 571).

As I have already said, the court of common pleas is, with respect to the marine court, in the position of an appellate tribunal, charged (save a few cases provided for) with the sole duty of reviewing questions of law; and the same reason that prevents the court of appeals from viewing matters resting in the discretion of other courts, applies with full force to appeals brought into this court from discretionary orders made by the marine court.

Estate of Bogert.

There is nothing in the amendment to section 3191 that introduces a new rule, for nothing in it requires us to review matters of discretion that the marine court has considered.

Again, the order before us was made after judgment, and section 3191 does not authorize an appeal to the court from such an order. *Lawrence v. Farley*, 73 *N. Y.* 189; *Bamberg v. Stern*, 76 *Id.* 555. This last observation is *obiter*, as is the further one, that the case of *Townsend v. Hendricks* (40 *How. Pr.* 143) would, in my opinion, warrant us in sustaining the appealability of the order, if it were not a discretionary order. I do not discuss the matter, though I have examined it, and formed a decided conclusion upon it.

The appeal should be dismissed, with costs.

VAN BRUNT, J., concurred.

ESTATE OF WILLIAM S. BOGERT, DECEASED.

SUPREME COURT, SECOND DEPARTMENT, GENERAL
TERM, MAY, 1884.

§§ 2611, 2618, 2623.

Will.—When admitted to probate against testimony of subscribing witness.

Where one of the witnesses to a will testified to its due publication and the other witness testified that he signed the will, and wrote his residence after his name at the request of the testator, and it appeared that the will and the attestation clause which was in the following words: "Signed, sealed and published by the said testament (*sic*) to be his testament in the presence of," were in the handwriting of the testator and that he was a man of more than ordinary intelligence and methodical in his habits,—*Held*, that the case was eminently proper for the application of the provision of the

Estate of Bogert.

Code that when a witness has forgotten the occurrence, or testifies against the execution of the will, the will may nevertheless be established upon proof of the handwriting of the testator and of the subscribing witnesses and also of such other circumstances as would be sufficient to prove the will upon the trial of an action, and that the proof was sufficient to establish the will on the trial of an action.

Estate of Bogert (4 *N. Y. Civ. Pro.* 441), affirmed; *In re Cottrell* (5 *Id.* 340), followed.

(Decided September, 1884.)

Appeal from decree of surrogate of Kings county admitting to probate the last will and testament of William S. Bogert, deceased.

Reported below, 4 *N. Y. Civ. Pro.* 441.

The will in question was dated April 12, 1883, and was executed some time subsequent to its date and about a month before the death of the testator, which occurred August 12, 1883.

The will and the attestation clause were written upon a single page of paper, and this was presented smooth and unfolded by Mr. Bogert to each witness when he signed his name.

William H. Gray and Jacob D. Fowler were the subscribing witnesses to the will; both were examined on the proceedings for probate, and they were the only witnesses produced and examined before the surrogate. Mr. Gray was a wholly disinterested witness. Mr. Fowler was a nephew of the deceased, and one of his next of kin and heirs at law, entitled to share in the estate if the will was broken.

The surrogate admitted the will to probate and the contestants took this appeal.

Further facts are stated in the opinion.

Scoville & Dewitt, for appellants.

Rufus F. Griggs and *M. J. McKenna*, for respondent.

Estate of Bogert.

The testimony of an interested witness may be rejected, even though it has not been directly contradicted. *Elwood v. The Western U. Tel. Co.*, 45 *N. Y.* 553; *Koehler v. Adler*, 78 *Id.* 287; *Kavanagh v. Wilson*, 70 *Id.* 177; *McNulty v. Hurd*, 86 *Id.* 547; *Lesser v. Wunder*, 9 *Daly*, 70; *Newhouse v. Godwin*, 17 *Barb.* 236. . . . Fowler was the witness of the court rather than of the proponent; we were compelled by law to call him; his credibility was therefore open to attack on our part. "The reason fails (*i. e.*, of not being allowed to discredit your own witness), when, in fact, the party is as in this case compelled by law to call him, no matter how much he doubts the credibility of the witness." *Thornton v. Thornton*, 39 *VI.* 122; *Alexander v. Beadle*, 7 *Caldwell (Tenn. R.)* ; 1 *Greenleaf on Evidence*, § 443; 2 *Taylor on Evidence*, 178; *Dennett v. Dow*, 17 *Me.* 12. . . . The court below has found, as a matter of fact, that the testimony of Fowler as to the non-publication of the will in his presence, was unworthy of credit. As the primary tribunal in these proceedings, it is to have serious allowance made to it on a question of fact found by it. For it has the opportunity to personally scrutinize the witnesses and their manner of testifying. *Gardiner v. Gardiner*, 34 *N. Y.* 157. And the court cannot reverse the decree of the surrogate, unless it appears to have been erroneously made. The presumption is in favor of its correctness. *Rollwagen v. Rollwagen*, 3 *Hun*, 121. Under the decisions, the testimony of Fowler shows a sufficient acknowledgment by the testator of his signature in Fowler's presence. The will, which barely fills a single page of foolscap, lay on the table open, and right before Fowler, when he was asked by the testator to sign it as a witness. Fowler admits that he saw the testator's name subscribed to it at the time. *Baskin v. Baskin*, 36 *N. Y.* 416; *Conboy v.*

Estate of Bogert.

Jenkins, 1 *N. Y. Supm. Ct. (T. & C.)* 622; Taylor v. Brodhead, 5 *Redf.* 627. . . .

“The fact that the testator was fully apprised of the testamentary character of the instrument, may be considered in aid of proof tending to establish a publication” (Gilbert v. Knox, 52 *N. Y.* 125; Trustees of Auburn Sem. v. Calhoun, 25 *Id.* 425; Seguire v. Seguire, 2 *Barb.* 385). “Probate of a will is to be granted or denied in view of all the facts attending its execution” (Taylor v. Brodhead, 5 *Redf.* 624; Tarrant v. Ware, 25 *N. Y.* 428; Lawrence v. Norton, 45 *Barb.* 448). . . . “The certificate of attestation to a will by a deceased witness, in connection with the other circumstances of the case, may warrant a jury in finding the due execution of the will against the evidence of the other subscribing witness, more especially when the witness denying the due execution thereof, had never before been called upon to witness a will, and knew nothing of the formalities required; . . . and should the testimony of the latter amount to a positive denial, the relative weight of the conflicting proof would then depend upon the apparent integrity and intelligence of the witness and the circumstances surrounding the particular case” (Orser v. Orser, 24 *N. Y.* 51).

The will in the above case was admitted to probate on presumptions arising from the circumstances attending its execution, notwithstanding the positive denial of its due execution by the only surviving subscribing witness. The fact that the attestation clause was regular, and that the deceased witness was an expert draughtsman of wills, was held to outweigh the adverse testimony of a witness who was shown to be ignorant of the required formalities. “Under these circumstances there can, I apprehend, be no doubt that a jury would be at liberty to find that the will was duly executed” (*Id.* 53; Webb v. Dye, 18 *West Va.* 376; Rugg v. Rugg, 83 *N. Y.* 592).

Estate of Bogert.

DYKMAN, J.—This is an appeal from the decree of the surrogate of Kings county admitting to probate the last will and testament of William S. Bogert deceased.

The controversy has reference to the celebration of the formalities required by statute in the execution of a valid and lawful will. The subscribing witnesses were William H. Gray and Jacob D. Fowler, and they were the only witnesses examined before the surrogate. There is an attestation clause below the will and both it and the will are in the handwriting of the testator. The attestation clause is as follows: "Signed, sealed and published by the said *testament** to be his testament in presence of." Then follows the names and places of residence of the witness. The testimony of William H. Gray shows a perfect execution of the will and a full compliance with all the statutory requirements. He says the testator told him he wanted him to witness a paper which he had before him on a table. It had then been signed by the testator, who then pointed to it and said "That is my will and that is my signature." Then the witness read the attestation clause and put his name under it and the testator requested him to put down his address.

The other witness, Fowler, testified that when he signed the paper he noticed the signature of Mr. Bogert and Mr. Gray, that Mr. Bogert requested him to sign it and he did so and then he asked him to sign his residence, but that he did not know what the instrument was.

We have therefore a testator who wrote his own will and who understood the formalities requisite to its due execution, for he complied with them all with the witness Gray. The handwriting of the testator and of the witness are all genuine and fully authenti-

* So in the will.

Estate of Bogert.

cated and no circumstance of suspicion appears against the will. The witness Fowler is a nephew of the deceased and his testimony is quite unsatisfactory. The case therefore seems an eminently proper one for the application of that wise provision of the Code of Civil Procedure, that if a subscribing witness has forgotten the occurrence or testifies against the execution of the will, the will may nevertheless be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action (*Code* § 2620).

The same principle had been enunciated by the courts of this state before the passage of this law, and it was applied in the very extreme and extraordinary case of Cottrell by the court of appeals not yet reported.* In that case both of the subscribing witnesses to the will testified that none of the formalities required by law were complied with in its execution in their presence, and positively denied that either of them were present at its execution or signed the attestation clause. Yet notwithstanding this testimony the surrogate found the will duly executed and admitted it to probate and the court of appeals affirmed the decree. That case is authority sufficient to uphold this decree, for there the burden cast on the proponents of the will was much greater than here. By the section of the Code to which reference has been made, the proof of the handwriting of the testator and the subscribing witnesses seems to be given great prominence and importance. In addition to that proof we have here the important fact that the will itself is in the handwriting of the decedent and that he held it several months after its date before he procured its attestation. So that all opportunity for imposition and misapprehen-

* Reported, 5 *N. Y. Civ. Pro.* 340.

Estate of Bogert.

sion is effectually removed. The will is the offspring of the testator's brain and the proof is that he was a man of more than ordinary intelligence and methodical in his habits. Faultless compliance with the statutory requirements is established by one witness, and it is very significant that the failing witness Fowler says that when he was called in by the testator he laid the paper down as he had done with the former witness Gray, requested him to sign it and when he had signed it he requested him to add his residence precisely as he had made the same request to Gray. It requires considerable credulity to believe that he did not at the same time publish his will and avow his signature. He knew its importance and necessity, and relied upon Fowler for the last witness to his will, which was to dispose of his property. To give credibility to the testimony of this witness would be equivalent to a finding that in that solemn moment he purposely did a vain thing when all his conduct shows that he intended to execute his last will and testament in view of his approaching dissolution, and this too in face of the fact that he had drawn with his own hand an attestation clause for the witnesses to sign, reciting all the necessary formalities, and that Fowler by signing that had certified that the requisite formalities had been observed. All the presumptions arising from the presence of the attestation clause and the execution of the will under the supervision of a person familiar with the statutory formalities, are to be indulged in, in this case and on the whole examination we are led safely to the conclusion that the proof is sufficient to establish this will on the trial of an action.

The decree should be affirmed with costs payable by the appellants.

BARNARD, P. J., and PRATT, J., concurred.

Muser v. Lewis.

MUSER, ET AL., RESPONDENTS, v. LEWIS, IM-
PLEADED, APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM; MAY, 1884.

§ 450.

Torts by wife—Husband's liability.

It is only as regards torts committed by the wife in the management or control of her separate property, that the common law rule as to the husband's liability is changed by the statutes of this state.

Where the wife receives stolen goods while carrying on a separate business, and becomes thereby liable in conversion, as the wife never acquired a property in the goods, the case does not fall within the above exception.

A partial satisfaction of damages by one of several joint tort-feasors, is admissible in mitigation of damages as to another of said tort-feasors.

Fitzgerald v. Quann, 1 N. Y. Civ. Pro. 273, disapproved.
(Decided June 26, 1884.)

Appeal by defendant Joseph Lewis from judgment for plaintiffs.

A motion was made in behalf of said defendant to dismiss the complaint as to him on the grounds, that there was no evidence in the case connecting him personally, with any of the tortious acts; that the defendant Mrs. Lewis, the wife of appellant, had used her separate means and estate in the transactions, and the same were the results of her separate business, and that her husband the appellant had no interest therein, nor connection therewith.

The motion was denied and an exception taken.

Further facts appear in the opinion

David Leventritt, for appellant.

I. The liability of the husband, for the wife's torts, grows merely out of the fact, that by the rules of the

Muser v. Lewis.

common law, a suit cannot be maintained against a wife alone during coverture, and if the two could not be sued together, the party suffering the injury would be without remedy." 2 *Bishop Married Women*, § 254; to similar effect see *Cooley Torts*, 115; *Capel v. Powell*, 17 *C. B. N. S.* 743; *Larkin v. Marshall*, 4 *Exch. R.* 805; *Newton v. Boodle*, 9 *Q. B.* 948; *Kowing v. Manly*, 49 *N. Y.* 192. The reason of the rule ceasing to exist by the provisions of the Code of Civil Procedure (§ 450) the rule itself is abrogated.

II. The husband is not liable for the torts of his wife. *Fitzgerald v. Quann*, 1 *N. Y. Civ. Pro.* 273; *Trebing v. Vetter*, reported in note, 12 *Abb. N. C.* 302; *Muser v. Miller*, 3 *N. Y. Civ. Pro.* 388; *Re Outwin's Trusts*, 48 *Law Times R. N. S.* 410; *James v. Barrand*, 31 *Weekly Rep.* 786; *Abouloff v. Oppenheimer (Q. B. Div.)* 30 *Id.* 429; *Re Fisher's Trusts*, 30 *Id.* 56; *Goods of Ayres*, 31 *Id.* 660; *Baum v. Mullen*, 47 *N. Y.* 578; see also *Rowe v. Smith*, 45 *Id.* 230; *Fiske v. Bailey*, 51 *Id.* 150; *Vanneman v. Powers*, 56 *Id.* 39; *Peak v. Lemon*, 1 *Lans.* 295; *Gillies v. Lent*, 2 *Abb. Pr. (N. S.)* 455; *Lausing v. Holdridge*, 58 *How.* 449. Now, in the case under consideration, it appears that the transactions were had by the wife, Mrs. Lewis, without the knowledge or participation of her husband, the appellant; she had a separate estate—to wit: the moneys invested and subsequently the property acquired through such investment, and the tort was committed in the prosecution of her separate business, and for her exclusive gain, and thus this action clearly affected her separate property.

III. Partial satisfaction by one inures to the benefit of other joint tort-feasors in mitigation of damages (*Knapp v. Roche*, 18 *Week. Dig.* 324; *Bush v. Prosser*, 11 *N. Y.* 347; *Wilmarth v. Babcock*, 2 *Hill*, 194). Satisfaction by one joint tort-feasor has always been

Muser v. Lewis.

held to be available as a bar to an action against another (*Livingston v. Bishop*, 1 *Johns.* 291; *Thomas v. Rumsey*, 6 *Id.* 31; *Bronson v. Fitzhugh*, 1 *Hill*, 185; *Knickerbocker v. Hawes*, 8 *Cow.* 111; *Brown v. Kinchelse*, 3 *Cold.* 192; *Merchants' Bank v. Curtis*, 37 *Barb.* 317; *Ruhle v. Turner*, 2 *H. & N.* 38; *Robertson v. Smith*, 18 *Johns.* 481; *Pearce v. Pearce*, 25 *Barb.* 243; *Pouting v. Watson*, 32 *Eng. L. & E.* 116; *Barrett v. Third Avenue R. R. Co.*, 45 *N. Y.* 628; *Woods v. Pangburn*, 75 *Id.* 495).

D. M. Porter, for respondents.

I. If the wife is the sole offender in the criminal act, the husband must be sued jointly for the damages arising therefrom (*Horton v. Payne*, 27 *How.* 374; *Tait v. Culbertson*, 57 *Barb.* 9; *Wagener v. Bill*, 19 *Id.* 321). The authority to a married woman to carry on a separate business, leaves the other common law incapacities in existence (*Coleman v. Burr*, 93 *N. Y.* 17). The common law liability of the husband for the wife's crimes continues in full force (*Bertles v. Nunan*, 92 *N. Y.* 152).

See also *Dimelon v. Rosenfeld* (*N. Y. Daily Register*, June 29, 1878, page 1241), Chief Justice SEDGWICK: "Although I believe the learned counsel has stated correctly the reasons of the husband being joined as a party in an action against his wife for her separate tort, nevertheless in case of judgment against them, he has to make satisfaction by his body or property. This was true, whether or not the wife has brought to the husband any property, so that practically the plaintiff has the right to resort to the husband's property or body for his wife's tort. I am not convinced that this right has been destroyed by the effect of recent legislation as to married women. If this be right, it may properly be enforced against the husband by joining him as a party with his wife. Sec-

Muser v. Lewis.

tion 450 does not forbid the joining of any party as defendant with a married woman in a proper case." See also *Berrien v. Steel* (1 *Civ. Pro. R.* 279); *Fitzsimons v. Harrington* (*Id.* 360); *Hoffman v. Lachman* (*Id.* 278).

Mrs. Lewis was perpetrating a felony and not carrying on any separate business. She was receiving the goods, knowing them to be stolen, consequently her husband is liable for this tort, because she never acquired title to the property in question. No one can acquire title to goods through the commission of a theft or by receiving stolen goods (*Hoffman v. Carow*, 21 *Wend.* 21; 22 *Id.* 285; *Conlan v. Latting*, 3 *E. D. S.* 353; *Brower v. Peabody*, 13 *N. Y.* 121).

II. No demand for the goods was necessary. Because they were received from the thief, knowing that they were stolen (*Pease v. Smith*, 51 *N. Y.* 477; *Glassner v. Wheaton*, 2 *E. D. S.* 352). The goods had been delivered to Mrs. Miller. After actual conversion no demand is necessary (*Glassner v. Wheaton*, 2 *E. D. S.* 352 [354]; *Vincent v. Conklin*, 1 *Id.* 203 [212]; *Sharp v. Whipple*, 1 *Bosw.* 557).

SEDGWICK, Ch. J.—The action was substantially for the conversion of plaintiff's personal property. Among the defendants in said action was Fanny Lewis, the appellant's wife. The proof showed that she was guilty of the actual conversion and her husband, the appellant, did not participate in it. The claim against him was grounded on the proposition that he was liable in damages for his wife's tort.

The testimony showed that a clerk of the plaintiffs stole from them, through a long time, a great quantity of laces, and from time to time sold them in parcels to the appellant's wife. The verdict was not taken as to whether she knew that they had been stolen.

Muser v. Lewis.

In *Baum v. Muller* (47 *N. Y.* 579), the court declared that the statutes in reference to married women, had not altered the common-law liability of the husband for the personal tort of his wife, but that such rule was changed by the statutes of 1860, chapter 90, and 1862, chapter 172, when such torts are committed in the management and control of her separate property. In *Rowe v. Smith* (45 *N. Y.* 233), Judge ANDREWS said, referring to these statutes, that "they leave unaffected, this liability for the strictly personal torts of the wife."

Both of these cases were directed to the necessity of joining the husband as defendant with the wife, in a charge of tort done by her. In the first case the tort was obtaining money by false representations of the agent of the wife, in contracting for the sale of her separate property, she receiving the money. The court said that the statutes of 1860 and 1862 provide that "the wife may sue and be sued in all matters having relation to her sole and separate property," and further that the action was clearly for "matters having relation to her sole and separate property." The matters related "to the management and disposition of her property."

In the second case the action was for damages to the plaintiff by the escape of the cattle of the defendant from land which was her separate property, and their trespassing upon defendant's land. The court said that the action was founded upon the duty of the owner of land to keep domestic animals from straying upon and injuring the premises of others. Such a duty had relation to the property that might be owned solely by a married woman, and that therefore, under the statutes of 1860 and 1862, she might be sued in the same manner as if she were sole.

Neither of the cited cases will support the present

Muser v. Lewis.

recovery, if the tort done by the appellant's wife related to her sole or separate property. On the other hand, if the tort did not relate to the wife's property, the principles stated in the cases make the appellant liable.

If the terms of the statutes are not to be enlarged by construction, for the reason that their meaning is clear without it, it would seem to be certain that the title to the goods always remained in the plaintiffs, and that they never became the property of appellant's wife. Therefore the tort did not relate to the wife's separate property. If it be supposed that the wife did gain a property of some kind by the transaction, the tort was a separated matter from that which had the appearance of conferring title, and had no essential connection with it, and so the tort was personal to the wife, as distinguished from one relating to her property.

A reference to another part of the statutes should be made. Section 2 of the Laws of 1860, chapter 90, provides that a married woman may carry on any trade or business, and perform any labor or services on her sole and separate account. *Coleman v. Burr* (93 N. Y. 17), shows that the generality of the clause as to services should be restrained, so that it does not include services done by the wife, for her husband and the family. The ground of the decision was that the objects which were to be obtained by the statutes, and the mischiefs which they were intended to remedy, suggested that there should be such a restriction, also considering that the common or former law remains, excepting to the extent it is clearly annulled by a subsequent statute (*Bertles v. Nunan*, 92 N. Y. 152). In like manner, it may be said as to the power of a married woman to carry on any trade or business, on her own account, that it was not intended to embrace a personal tort that had no real connection with trading or

Muser v. Lewis.

carrying on a business. In a sense, it is an anomaly, in view of the real independence, personally, of a wife that her husband should be liable for her tort of which he may know nothing, when and where and how it was done. The hardship is not increased by his being liable for a tort, the time of which is within the hours a wife may choose as the time when she says she is transacting her business, and at the place where her business is done, and it has but a circumstantial, but no real connection with buying or acquiring.

Several parts of the statutes indicate that they did not contemplate a sole liability of the wife for a tort, incidentally committed by her, when she was carrying on a separate business.

The first section of chapter 90, Laws of 1860, provides that the property which any married woman acquires by her business carried on, on her separate account, shall be her separate property. Section 2 is, the earnings from her trade shall be her separate property. Section 8 provides that no bargain or contract entered into by any married woman, in or about the carrying on of any trade or business, shall be binding upon her husband, or render him or his property in any way liable therefor. It will be observed that no reference is made to the wife's torts. In view of these enactments, section 7 states when a married woman may be sued in the same manner as if she were sole. It is not declared that she may be sued in matters having relation to her separate business, but in matters having relation to her sole and separate property. It has been already considered that the tort in question did not relate to her property.

The learned counsel for the appellant presents an argument of weight. It is, that if a married woman may acquire separate property by her own action, as if she were sole, it is not intended that there can be legal power of interference by her husband with any

Muser v. Lewis.

steps she may take to acquire that property, and if there be no power of interference there should be no legal responsibility. This seems to be sufficiently answered by considering that the sole liability of married women is such only as the legislature has seen fit to make, and that, as we have seen, is confined to matters that relate to what is in fact the married woman's sole property.

They affect a more recent statute. Section 450 of the Code of Civil Procedure remains to be examined and particularly with reference to the learned opinion in *Fitzgerald v. Quann*, 1 *N. Y. Civ. Pro.* 273. The court in that case thought that the last clause of the section: "It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property," did not imply that it was necessary to join him in other cases, because the previous part of the section declared otherwise, and embraced all actions against married women. But to me, it seems that the first part has no regulation for the bringing of actions, or when or as to what a married woman might be sued as if she were single. It only says that when she is sued, whether on a joint or individual claim against her, her husband should not, as by common law he might, appoint an attorney to appear for her and defend, but she appears *sui juris*, and defends as if she were not married. If this be correct, it has no bearing upon the implication of the second part of the section.

I am of opinion, therefore, that the appellant was responsible to the plaintiffs. If he were liable, there is no question in the case as to his being made defendant jointly with the wife, against whom an individual liability is claimed. She would be the party to raise that question, and she has not done so.

One other matter demands attention. It appeared by plaintiff's case, that after the receiving of the goods

Muser v. Lewis.

by the appellant's wife, the plaintiffs had recovered certain of the goods, and had also received certain moneys from a Mrs. Miller, in payment of a judgment obtained for the conversion by her of the goods involved in this action, the appellant's wife having sent the goods to Mrs. Miller. The court refused to charge, as requested by the appellant's counsel, that the jury should deduct from the value of the goods converted the sum paid by Mrs. Miller. This request, I think, should have been granted, under the case of *Knapp v. Roche* (18 *Week. Dig.* 324). It was not matter of defense, but concerned the plaintiffs' proof as to what damage they had in fact suffered.

It is not necessary, however, to order a new trial on this ground. The plaintiff's proof was that he had received from Mrs. Miller a sum of money, which, with what the court directed should be deducted for other reasons, amounted to a sum which the defendant's counsel claimed in his requests was the sum to be deducted, viz.: \$5,200. The requests did not specifically refer to this sum, but they were based upon the evidence as given by the plaintiffs, and there was no doubt as to this sum being all that was received by plaintiffs. The court instructed the jury to deduct a parcel of this amount, to wit, \$2,224.76, but the rest, that is, \$2,975.24, should have been deducted. This may now be deducted from the verdict, as that ascertained the value of the goods, without including interest.

The judgment appealed from should be reversed, unless the plaintiff stipulate that from the amount of the verdict \$2,975.24 be deducted, and in case of such stipulation the judgment as so reduced is affirmed, without costs of appeal to either party.

INGRAHAM, J., concurred in the result.

Dock v. South Brooklyn Saw Mill Co.

DOCK v. THE SOUTH BROOKLYN SAW MILL
COMPANY, ET AL.SUPREME COURT, KINGS COUNTY, SPECIAL TERM,
AUGUST, 1884.

§§ 755-757.

*Revival and continuance of action in case of death of plaintiff—Assignee
—Counter-claim.*

Where in an action against a corporation to foreclose a mortgage for \$40,000, a counter-claim was interposed for \$140,000, moneys alleged to have been misappropriated by the plaintiff while a trustee of the defendant, and the plaintiff died before the cause was tried, and thereafter one "S." moved to be allowed to continue the action, and to be substituted as plaintiff on proof by affidavit that the plaintiff left a will, which was duly admitted to probate in Pennsylvania; that the executrix named therein had duly qualified, and that the executrix was sole legatee under the will, and thereafter assigned the mortgage to said "S."—*Held*, that the motion should be granted; that the counter-claim did not affect the question as the executrix could assign the bond and mortgage, and the assignee could bring a new suit therefor in which the counter-claim could be used only to the extent of a set off against the mortgage.

McLaughlin v. Brett (2 N. Y. Civ. Pro. 194), followed.
(Decided August 2, 1884.)

Motion by one Isaac Schlicter that the action be revived and continued, and that he be substituted in the place of the plaintiff, now deceased.

This action was commenced in March, 1883, for the foreclosure of a mortgage on real property made by the defendant, a domestic corporation, to plaintiff to secure the payment of the sum of \$40,000.

The answer set up among other defenses, that no consideration had been given for the mortgage, and also a counter-claim for \$140,000, moneys alleged to

Dock v. South Brooklyn Saw Mill Co.

have been misappropriated by the plaintiff while a trustee of the defendant; it alleged that there had been for many years mutual dealings and accounts between plaintiff and defendant wherein upwards of \$1,000,000 were involved; that the plaintiff while a trustee of the defendant had dealt unfairly, and that the accounts of such transactions if properly made, would show an indebtedness to the defendant from plaintiff of over \$140,000; it demanded an accounting and judgment for the sum found due.

Issue was joined on the counter-claim by the service of a reply in November 1883 setting up the statute of limitations; denials of allegations contained in the answer and other defenses.

In February, 1884, and before the trial of the cause, the plaintiff departed this life.

Nothing further was done in the case until August, 1884. The plaintiff always resided prior to and at the time of his decease in the city of Philadelphia, Pa. A notice of motion and affidavits entitled in the action were served on defendants attorney in August 1884 seeking for an order "directing that the above entitled action be continued by Isaac Schlichter as plaintiff in place of Luther Dock plaintiff deceased, and granting the said Isaac Schlichter leave to amend the complaint herein as he shall be advised."

The moving affidavits were made by deceased plaintiff's attorney in the case, by one Rex, the alleged clerk of the orphans' court of the county of Philadelphia, by said Isaac Schlichter the alleged assignee of the mortgage and cause of action by assignment from one Susan V. Dock, the alleged executrix and sole legatee of decedent; a copy of alleged assignment of said mortgage signed by said Susan V. Dock individually was also annexed to the motion papers.

The moving affidavits were in effect that plaintiff had died; had left a will; that it had been proved

Dock v. South Brooklyn Saw Mill Co.

under the laws of Pennsylvania and admitted to probate there; that since the death of plaintiff, the executrix (said Susan V. Dock), named in said will had qualified in Pennsylvania under its laws, and had executed an assignment of the cause of action and of the mortgage and bond to Isaac Schlieter; said Isaac Schlieter also a resident of Philadelphia deposed that he had bought the same from said executrix. No copy of any will nor official certificate by any officer showing executor's appointment was produced on the motion, nor did it appear that any will of plaintiff had ever been filed in any office for probate within this state.

The said moving papers were returned within twenty four hours to the attorney for the plaintiff and for the applicant Isaac Schlieter who served them with the following objections indorsed thereon.

"The within affidavits and papers are herewith respectfully returned upon the ground, first, that the service of the same is unauthorized by the law and the rules of practice of the court of the state of New York, the said plaintiff having died on or about February 6, 1884; on the further ground that the controversy lately existing between one Luther Dock and this defendant cannot under the circumstances be brought before the court upon said application of yourself as attorney for the plaintiff and of one Isaac Schlieter, the said Schlieter and yourself as his attorney, being strangers to this matter, and on the ground that you are in no respect qualified or entitled to make or serve said papers in the said suit referred to."

Notwithstanding the return of the papers the motion was thereafter argued.

Tunis G. Bergen, for the motion.

Cited *Green v. Martine*, 1 *N. Y. Civ. Pro.* 129; *Smith v. Zalinski*, 94 *N. Y.* 519; *Holsman v. St. John*, 90 *Id.* 461 (rev'g 2 *N. Y. Civ. Pro.* 48).

Dock v. South Brooklyn Saw Mill Co.

Manley A. Raymond, opposed.

The action by plaintiff's death was stayed as to every person other than plaintiff's executor or administrator. In *Rogers v. Adriance* (22 *How. Pr.* 97), it was held, "The doctrine of privity has never been carried so far as to authorize a revivor in a suit brought by a party in interest who dies, and the appointment of an executor—no revival by him, but a transfer of the right and subject of the action, and a revival by the assignee." The affidavits were not legal or proper evidence of any of the facts respecting the will of decedent; its validity, contents, probate or effect, to make a proper *prima facie* case showing legal succession to the alleged assignee and proposed plaintiff. A copy of the will (if any) should first be exemplified and authenticated and produced on the motion as required by sections 2695, 2703, 2705 of the Code. See also 10 *How. Pr.* 253. The moving papers left it undecided whether the proposed applicant Schlieter had any true legal relation to the case. The applicant Schlieter, even if proper proof of assignment and succession had been adduced, should not be allowed to be substituted as plaintiff in the action because of the issues raised by the counterclaim and reply. The motion if granted would prejudice the defendants in so far as they were actors in the case.

"Where a substitution will prejudice any right, or interest, or remedy of the defendant, the court will either refuse to permit it or grant it only such terms as will protect the defendant from injury" (*Howard v. Taylor*, 11 *How. Pr.* 380; *S. C.*, 5 *Duer*, 604).

"Where a defendant interposes a counter-claim in an action and asks for affirmative relief and issue is joined upon the claim, he becomes an actor in the case and may proceed in it as if he were in fact a plaintiff" (43 *How. Pr.* 272; affirmed in *Livermore v. Bainbridge*,

 Kaufman v. Lindner.

49 *N. Y.* 129; Gleason v. Niven, 2 *Duer*, 643; Potter v. Van Vranken, 36 *N. Y.* 619).

CULLEN, J.—The case of *McLachlin v. Brett* (2 *N. Y. Civ. Pro.* 194) is on all fours with this case, except in respect to the counterclaims. The appeal to the court of appeals from the decision in that case was dismissed and the case must be considered as overruling the case of *Rogers v. Adriance* (22 *How. Pr.* 97). I do not think the counter-claim herein affects the question. The executor could assign the bond and mortgage, and the assignee could certainly bring a new suit therefor in which the counter-claim could be used only to the extent of a set-off against the mortgage.

The same can be done in this case.

KAUFMAN AND ANOTHER v. LINDNER.

CITY COURT OF NEW YORK, SPECIAL TERM, JUNE,
1884.

§§ 549, subd. 4, 1268.

Bankruptcy.—When judgment not discharged of record on account of debtor's discharge in.—*Fraud.*—What amounts to, in contracting liability.—*Necessity of pleading.*

Where, on a motion by a judgment debtor to discharge a judgment of record under section 1268 of the Code of Civil Procedure, on the ground that he had been discharged in bankruptcy, it appeared that, although the action was to recover on contract for goods sold and delivered, and money loaned, an order of arrest was granted in the action on the ground that the sales and loans were induced by the false and fraudulent representations of the judgment debtor, and that he had removed and concealed his property for the purpose of defrauding his creditors, and he did not answer or demur to the complaint,—*Held*, that the debt was not discharged by the

Kaufman v. Lindner.

proceedings in bankruptcy, and the motion should be denied;[⁴] that purchases made with the intent of not paying for them are fraudulently contracted, and debts thus contracted are not discharged by a discharge in bankruptcy;[¹] that the judgment did not merge the alleged fraud, and the court can, for the purpose of the bankruptcy statute, go behind the judgment to see whether the claim upon which it was recovered was created by fraud.[²]

Prior to the enactment of chapter 542 of the Laws of 1879, adding subdivision 4 to section 549 of the Code of Civil Procedure, the complaint in an action on contract in which the arrest of the defendant was sought on the ground of fraud in contracting the liability, should not contain the allegations of fraud, and the nature of the action and character of the claim in such a case was not determined by the demand of the complaint.[³]

(*Decided June, 1884.*)

Motion to cancel and discharge a judgment of record under section 1268 of the Code of Civil Procedure.

The opinion states the facts.

HYATT, J.—This is a motion by a judgment debtor, claiming to have been discharged in bankruptcy from the debt on which the judgment in this action was recovered, for an order directing the clerk of this court to cancel and discharge the said judgment of record.

The motion is made under and pursuant to section 1268 of the Code of Civil Procedure, and the facts are as follows: The plaintiffs recovered judgment against the defendant May 21, 1874, for \$416.23 on a demand for goods sold and delivered and for money loaned by them to the defendant, which became due and payable before April 27, 1874.

On said last mentioned day proceedings in bankruptcy were begun against the defendant, in which he is called "Israel" Lindner, and on May 9, 1874, he was duly adjudicated a bankrupt. On May 22, 1882, the defendant was discharged in bankruptcy under the name of "Israel" Lindner from the payments of all

Kaufman v. Lindner.

debts due from him on and before April 27, 1874, not excepted by section 5117 of the Revised Statutes of the United States.

An order of arrest was granted and the defendant arrested thereunder, as appears by the certificate of the sheriff of the service of the order, affidavits and summons; the defendant appeared in the action, but failed to answer or demur to the complaint.

The affidavits, upon which the order of arrest was granted, aver the purchase of goods by the defendant from the plaintiffs upon his representations that he had a valuable stock of jewelry in his store; that by reason of paying out large sums of money he was then short, but expected soon to pay all he owed plaintiffs; that he owed very little to any one else, and that his stock was all paid for except a few hundred dollars; they further aver that the plaintiffs believing and relying upon the representations of the defendant, sold and delivered to him a quantity of goods; that the said representations were false; that the defendant was wholly insolvent; that he did not pay either the plaintiffs or others to whom he was largely indebted, and that he had removed, concealed or secreted the said stock from his store for the purpose of defrauding his creditors.

Section 5117 *supra*, provides that "no debt created by the fraud of the bankrupt shall be discharged by proceedings in bankruptcy." Claims usually comprised under this title, are those which have been incurred by any false representations or pretense of [] the bankrupt. Purchases made with the pre-conceived intent of not paying for them, are fraudulently contracted, and the debts thus arising are not discharged under this section (*Stewart v. Emerson*, 8 *Benedict* [U. S. Circ.] 462).

The judgment in this action did not merge the [] alleged fraud; the court can, for the purposes of

Kaufman v. Lindner.

the bankruptcy statute, go behind the judgment, to see whether the claim upon which it was recovered was created by fraud (*In re Patterson*, 1 *Benedict* [U. S. Circ.] 307; *In re Whitehouse*, 4 *Id.* 63; *Warner v. Kronkhite*, 13 *Id.* 52).

The defendant contends, however, that this action was upon contract, because the complaint, which was served after the granting of the order of arrest, was for a sum of money only, for goods sold and delivered and money loaned, and that the claim upon which the judgment was recovered, was therefore discharged by the operation of the defendant's discharge in bankruptcy.

The nature of the action and character of the [3] claim is not to be determined in the case at bar, by the demand of the complaint, for the reason that prior to the amendment of 1879* (adding subdivision 4 to section 549, *Code Civ. Pro.*), it had been well settled that in this class of cases the complaint should not contain the allegations of fraud.

In my judgment the affidavits, upon which the [4] order of arrest was granted, disclose a claim incurred by the false representations of the bankrupt, which was not discharged by the proceedings in bankruptcy.

If I am right in my conclusion, it is unnecessary to consider whether the defendant is entitled to the benefit of a discharge granted to him in the name of "Israel" instead of Isidore.

The motion is denied, with \$10 costs.

* *Laws of 1879*, chap. 542.

Davenport Glucose Co. v. Taussig.

DAVENPORT GLUCOSE COMPANY, RESPONDENT,
v. TAUSSIG, ET AL., APPELLANTS.SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1884.§§ 837, 870 *et seq.*

Examination of party before trial in action to recover chattels the sale of which was procured by fraud.—Assignee for benefit of creditors.

In an action by a vendor against his vendees and their assignee for the benefit of creditors, to recover the possession of certain chattels forming a part of the assigned estate, on the ground that the vendees obtained the sale and possession fraudulently, the assignee may be examined as a party before trial, and as many questions may be asked the vendees which they would be bound to answer if called upon the trial, they may be required to submit to an examination before trial. On such an examination they are not bound to criminate themselves, and may claim the personal privilege of refusing to answer, and it would be for the judge to determine, as it would be on a trial at circuit, whether the questions are such as they are not bound to answer, but the fact that such questions may be put, does not seem to be a good reason for holding that a party cannot be examined at all in such an action.

(Decided May 9, 1884.)

Appeal from an order of the special term denying motion to vacate an order for the examination of the defendants before trial.

The facts are stated in the opinion.

W. C. Heppenheimer, for appellants.

The general term of this court, in the case of *Andrews v. Prince* (31 Hun, 233), have held that in actions upon fraud, deceit and fraudulent conspiracy, an order for the examination of a party defendant

Davenport Glucose Co. v. Taussig.

before trial will be vacated when the object is to procure testimony to establish the fraud. . . .

Where on the return day the party moves to vacate on the ground that he could not be compelled to criminate himself, the burden is on the plaintiff, the complaint not having been served, to show that there are material matters as to which the defendant could be examined, and on his failure to do so the order should be vacated before the defendant is sworn. *Corbett v. De Comeau*, 44 *N. Y. Super. Ct.* 303; *S. C.*, 5 *Abb. N. C.* 169; *Levy v. Loeb*, 44 *N. Y. Super. Ct.* 291; *aff'd*, 75 *N. Y.* 699. On the return of the order for the examination of witnesses before trial where the parties are before the court, a motion may be made to discharge it on affidavits, without giving previous notice or serving copies of such affidavits. *Barker v. Wilder*, 21 *Hun*, 584; *S. C.*, 10 *N. Y. Weekly Dig.* 252.

A. P. Whitehead and Richard Stackpoole (Martin & Smith, attorneys), for respondents.

The privilege of the witness is personal, and he may waive it. The counsel should be permitted to ask the question, and the judge should advise the witness that he is at liberty to decline answering. *Southard v. Rexford*, 6 *Cow.* 254; *People v. Bodine*, 1 *Denio*, 281. The court should determine whether the answer the witness may give can criminate him. *People v. Mather*, 4 *Wend.* 229. In an action for usury, where witness declined to answer on the ground that he would criminate himself, held that the court should decide whether the witness should be compelled to answer. See *Fellows v. Wilson*, 31 *Barb.* 162. A party cannot object that the answer may tend to criminate the witness. The objection is personal to the witness only. *People v. Carroll*, 3 *Parker's Cr.* 73.

The plaintiffs should be allowed to examine the defendants subject to their right to object to such

Davenport Glucose Co. v. Taussig.

questions, if any, as may tend to criminate or degrade them. The general term of this court, in January, 1881, sustained an order for the examination of defendants before trial in an action to set aside a general assignment of creditors on the ground of fraud. See *Tenny v. Mautner*, 1 *N. Y. Civ. Pro.* 64. The plaintiff was allowed to be examined before trial by the defendant, whose defense was, that the plaintiff had made false and fraudulent representations in regard to certain goods. *Sprague v. Butterworth*, 22 *Hun*, 503. The court holding that the plaintiff could claim his privilege if questions were put to him tending to criminate or degrade him. The justice before whom examination of a party before trial is taken may limit examination. *Hutchinson v. Lawrence*, 3 *N. Y. Civ. Pro.* 98. The order should not be set aside, unless the evidence sought relates exclusively to facts, which if proved, would show the witness was guilty of a crime. *Canada Steamship Co. v. Sinclair*, 3 *N. Y. Civ. Pro.* 284.

DAVIS, P. J.—This is an appeal from an order of the special term denying motion to vacate an order directing examination of defendants before trial. The action is to recover possession of personal property, to wit, 250 barrels of glucose alleged to have been sold by the plaintiffs to the defendants Taussig and Hammerschlag, who subsequently made a general assignment to the defendant Barricklo, for the benefit of their creditors. The plaintiff replevied 170 barrels of glucose. It is alleged that the sale and possession were fraudulently obtained.

It must be conceded that the authorities in this district, on the question of the right to make an order for the examination of parties in an action where the plaintiff's cause of action is for an alleged fraud, are somewhat in conflict. There is no case, however, we think, that holds in an action to recover possession of

Davenport Glucose Co. v. Taussig.

personal property, where the object is to ascertain from the defendants the quantity of goods that came into their hands, and the time when they received the same, and the time of making the sale or transfer of the same to another party, and the quantity delivered to him, &c., that such matters are not proper subjects for this preliminary examination.

In this case, the assignee of the purchasers, Barricklo, who is not sought to be charged with fraudulent conduct, received the goods from the defendants. No reason can be imagined why he may not be called and examined as to when and where he received the same, and to what amount; and to prove whatever might be necessary touching the assignment to him of the goods by the other defendants, and the disposition that may have been made thereof. It can hardly be conceived that his answers to such an examination can be supposed to subject him to a charge of fraud.

In respect of the other defendants, it is very obvious, as it seems to us, that many questions may be asked which they will be bound to answer if called upon the trial, and if in the course of such an examination as this, questions may be asked which they decline to answer, on the ground of their privilege, their rights are precisely the same as they would be upon the trial, if the same questions were put to them there. They are not bound to criminate themselves, and may claim the personal privilege of refusing to answer. On such an examination it would be for the judge to determine, as would be on a trial at circuit, whether the questions are such as they are not bound to answer.

But the fact that some such questions may be put does not seem to be a good reason for holding that a party cannot be examined at all in an action of this kind.

The cases referred to by the learned counsel for the appellants do not go far enough, we think, to require

Fitzsimmons v. Curley.

us to hold that they determine this case adversely to the respondents.

We see no ground, therefore, for interfering with the order of the court below, and it should be affirmed, with \$10 costs and disbursements.

DANIELS and HAIGHT, JJ., concurred in the result.

FITZSIMMONS, APPELLANT, v. CURLEY, IM-
PLEADED, RESPONDENT.

N. Y. SUPERIOR COURT, GENERAL TERM, MAY, 1884.

§§ 3268, 3269.

Non-residence.—Security for costs.

In order to require plaintiff to give security for costs, on the ground of non-residence, it must appear either, that he was, when the action was commenced, a person, residing without the state, or that after the action was commenced, he ceased to be a resident of this state.

Where defendant, with knowledge of the facts, proceeds with the trial, it is too late to move for security for costs.

(Decided June 16, 1884.)

Appeal from an order directing plaintiff to file security for costs as a non-resident.

The facts appear in the opinion.

Adolphus D. Pape, for the appellant.

George H. Starr, for the respondent.

PER CURIAM.—In order to require the plaintiff to give security for costs, it must appear either, first,

Fitzsimmons v. Curley.

that she was, when the action was commenced, a person residing without the state (*Code*, § 3268), or, second, that after the commencement of the action the plaintiff ceased to be a resident of the state (§ 3269).

There is no evidence that plaintiff was not, at the commencement of this action, a resident of this state. Defendant swears that one Johnson told him that plaintiff was living in the state of California, and had been living there for years. Mr. Bennett says that plaintiff resided in this state up to about a year ago, when, he is informed, she left on a visit to Portland, Oregon, and that she was expected back soon to resume her business as domestic. It thus appears positively that she was a resident of New York when the action was commenced. The only evidence that she has ceased to be a resident since the commencement of the action, is the statement of Johnson to defendant; in answer to that, McNeil informed Mr. Bennett that she is expected to return to New York soon and is away on a visit. We do not think that it sufficiently appears that plaintiff is a non-resident. We are also of the opinion that defendant by proceeding with the trial before Judge FREEDMAN, waived his right to the security. So far as appears, he knew all the facts he has stated in his affidavit, prior to commencing the trial, and knowing all those facts he proceeded with the trial and did not make this application until Judge FREEDMAN had suspended the trial and ordered certain issues to be tried by a jury. It was then too late. Having proceeded with the trial he had waived his right to require the security (*Buckley v. Gutta Percha Co.*, 3 N. Y. Civ. Pro. 432).

The order should be reversed and motion denied, with \$10 costs and disbursements.

Before SEDGWICK, Ch. J., and INGRAHAM, J

Jenks v. Van Brunt.

JENKS, RESPONDENT, v. VAN BRUNT, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, MARCH, 1884.

§ 1207.

Appeal.—When judgment not reversed where its correction depends on credibility of witness.—Reducing judgment.—Power to amend complaint on appeal.

Where it appeared that a verdict was wrong, if the evidence of the defendant's witnesses had been fully credited, and it was manifest that their testimony was not so credited, and the judge before whom the case was tried, who was an able and careful judge, denied a motion for a new trial on the ground that the verdict was against the weight of evidence,—*Held*, that it was not the duty of the general term on appeal from his order denying such motion, to make a critical examination of the evidence with a view to see whether the decision of the motion was correct.

Where a verdict was for a small amount greater than the claim for recovery in the complaint, and it did not appear that the attention of the court below had been called to the subject either on the trial or on the motion for a new trial,—*Held*, that it was doubtful, whether the general term on appeal could permit the plaintiff to amend his complaint so that the judgment would be consistent, with the case made and embraced within the issues; that the judgment should be reduced by deducting the excess, and as reduced, affirmed.

(Decided May 9, 1884.)

Appeal from judgment entered upon verdict, and from order denying motion for new trial on the minutes of the judge, and on the ground that the verdict is against the weight of evidence.

Austin S. Cushing, for appellant.

John Brooks Leavitt, for respondent.

Jeuks v. Van Brunt.

DAVIS, P. J.—This action was tried before an able and careful judge, and the motion for new trial on the ground that the verdict was against the weight of evidence was made before, and considered by, him, and denied.

On looking through the evidence it is quite apparent that the verdict was wrong, if the testimony of the defendant and his witnesses had been fully credited by the jury. But it is manifest that their testimony was not so credited; and the learned judge before whom the case was tried, having full opportunity to see and hear the witnesses and to determine their relative credibility upon the motion before him, refused to interfere with the verdict.

Under such a state of facts we do not think it our duty to attempt a critical examination of the evidence with a view to see whether the decision of the learned judge upon the motion was correctly disposed of, because it is clearly apparent that our conclusion would have to depend upon the question already suggested, whether the testimony on the part of the defendants was or was not entitled to credit, in preference to that on the part of the plaintiff.

Under such circumstances, we think it our duty to affirm the order denying the motion for new trial. And as that is substantially the only question upon the general merits of the case in the appeal from the judgment, the same result will necessarily follow.

It seems to be apparent that the verdict was for a small amount greater than the claim for recovery in the complaint with interest added thereto. That amount seems to be \$39.34. There is nothing in the papers to show that the attention of the court below either at the trial, or upon the motion for new trial was called to this fact or that any suggestion was made on the subject. If the attention of the judge had been called to the fact he would undoubtedly have directed

Jenks v. Van Brunt.

a deduction, or have ordered an amendment of the complaint so that the verdict would not exceed the amount demanded with interest.

Section 1207 of the Code of Civil Procedure provides, that where there is no answer the judgment shall not be more favorable to the plaintiff than that demanded in the complaint, and where there is an answer the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue.

We do not see why, under this section, if the attention of the court had been expressly called to the excess at the trial, he could not have permitted the plaintiff to amend his complaint, so that the judgment would be consistent with the case made by it, and embraced within the issue. This was not, however, done, and it is doubtful whether this court possesses the power at this stage of the case to make such an amendment.

If attention had been called to this discrepancy between the sum demanded in the complaint and the verdict rendered, there would appear to be such an error as to require this court to reverse the judgment and order a new trial unless the excess should be deducted, without costs of the appeal to either party.

But where no suggestion is made until the argument of the appeal, we think this court ought to exercise its discretion as favorably to the plaintiff as may be done under established rules.

We think we ought in this case to direct that the judgment should be reduced by deducting the excess as of the date of the verdict, and as so reduced, affirmed with costs.

DANIELS and HAIGHT, JJ., concurred.

Orden Germania v. Devender.

ORDEN GERMANIA, RESPONDENT, v. DEVENDER,
APPELLANT.

N. Y. COMMON PLEAS, GENERAL TERM, MAY, 1884.

§ 531.

Bill of particulars.—When granted.

It appeared from the complaint that plaintiff was a mutual benefit association, duly incorporated; that between certain dates defendant was the treasurer of its grand lodge; that moneys were received for plaintiff during that period, from branch lodges, by the financial secretary; and that it was defendant's duty to collect said moneys from said secretary. The complaint then sets forth in various counts, that defendant either wrongfully converted to his own use, \$2,000, or by wrongful neglect of his office allowed the financial secretary so to do,—*Held*, that plaintiff should furnish a bill of particulars of moneys received and paid by defendant and also by said financial secretary, showing dates, amounts, names of branch lodges, etc.

(Decided June 30, 1884.)

Appeal by defendant from order of special term, so far as it denies the full relief prayed for by him on his motion for a bill of particulars.

The plaintiff in its complaint alleges that it is a corporation duly organized under the laws of the state of New York; that by virtue of the powers in it vested, it instituted a central grand lodge, central board of finance, &c.; after stating the duties of the central grand lodge, that it was the duty of the treasurer elected by the central grand lodge to receive from the financial secretary of the central board of finance all moneys belonging to the plaintiff, and after stating the duties of the various lodges and officers of the grand lodge, the complaint charges that:

Orden Germania v. Devender.

At all times between October 12, 1873, and December 16, 1881, the defendant was the treasurer of the grand lodge in the state of New York of the plaintiff.

On information and belief, that between February 14, 1879, and December 16, 1881, the branch lodges of the plaintiff caused to be paid to the financial secretary of the plaintiff, in the grand lodge of the state of New York, plaintiff's moneys, amounting to upwards \$68,100.50, belonging to the fund to help the sick.

On information and belief, that defendant abandoned the performance of his duties to the financial secretary of the plaintiff in the grand lodge of the state of New York, and negligently failed to receive and collect from said financial secretary all moneys so paid to him by branch lodges of plaintiff, from February 14, 1879, to December 16, 1881, by reason of which failure the said financial secretary was enabled to and did wrongfully convert to his own use the sum of \$2,000 and over of moneys belonging to the plaintiff.

On information and belief, that between the said February 14, 1879, and December 16, 1881, divers large sums of money belonging to the plaintiff, exceeding the sum of \$2,000, were paid to and had been received by defendant as treasurer as aforesaid, for and to the use and benefit of plaintiff; that defendant was requested to pay over to plaintiff large sums of money belonging to plaintiff, viz.: \$2,000 and over, and has refused to pay over the same.

On information and belief, that defendant has wrongfully converted to his own use the sum of \$2,000 and over, of moneys in his hands belonging to the plaintiff.

G. Levy, for appellant.

Kaufmann & Saunders, for respondent.

Orden Germania v. Devender.

J. F. DALY, J.—The defendant was entitled to a bill of particulars which should show what moneys it is claimed were collected by him, and what sums plaintiff acknowledges to have received from him between February 14, 1879, and December 16, 1881, the periods mentioned in the complaint.

The bill of particulars should also specify which of said sums were collected by defendant and which of said sums were received by the financial secretary from whom defendant should have collected them. Plaintiff must prove all these particulars in order to sustain its claim that defendant has converted \$2,000, or suffered the financial secretary to convert that sum by neglecting to collect it, and the defendant is entitled to know in advance of the trial, the particulars of the claim thus to be proved. The statement of the complaint on the point is too general.

It is no answer to defendant's application for a bill of particulars to say that he is presumed to know what moneys he has collected and what moneys he has paid over. There is no presumption that he has information of moneys which he has collected but has not accounted for, because it is not to be presumed in advance of the trial, that he has been guilty of such a breach of trust and that he therefore must know the particulars of his guilt. He is certainly not presumed to know what a third party, the financial secretary has collected, and failed to account for.

The order should provide that plaintiff serve a bill of particulars on defendant's attorney within ten days showing what sums it is claimed were received by the financial secretary of plaintiff between February 14, 1879, and December 16, 1881, from branch lodges of plaintiff, giving dates, amounts and from what lodges received, also showing what sums it is claimed were received for plaintiff by defendant as its treasurer between the same dates, giving the date and amount of

Anthony v. Wood.

each receipt, and from whom received. Also showing what sums it is claimed were paid over by the financial secretary to defendant and by defendant to plaintiff between such dates.

Defendant should have \$10 costs of the motion and \$10 costs of this appeal besides disbursements of motion and of appeal.

BEACH, J., concurred.

ANTHONY, APPELLANT, v. WOOD. BOWE, SHERIFF, ETC. RESPONDENT.

COURT OF APPEALS, 1884.

§§ 648, 649.

Attachment.—Mode of levying on promissory note, etc.—Effect of prior fraudulent transfer.

Section 649 of the Code of Civil Procedure, which provides that when property sought to be attached is "capable of manual delivery, including a bond, promissory note or other instrument for the payment of money," the levy is to be made "by taking the same into the sheriff's actual custody," merely provides for the mode of making the levy, but in no respect alters the inherent character of the property, and if a bond or note sought to be attached, has been transferred, however fraudulently, no lien by attachment is possible and the possession of the bond or note by the officer under his warrant, accomplishes nothing.[^{1, 2, 3}]

Until the sheriff has obtained actual custody of property, "capable of manual delivery including a bond, promissory note, etc. or other instrument for the payment of money" sought to be attached, he has made no levy and can make none:[^{6, 7,}] service of a copy of the warrant upon the person having possession of such property, is not a levy thereupon, and where the sheriff afterwards obtains possession of the property, his possession does not relate back to the time of such service.[⁴]

Thurber v. Blanck (50 N. Y. 80); Castle v. Lewis (78 Id. 131), fol-

Anthony v. Wood.

lowed:[¹] *Bills v. Nat'l Park Bank* (89 *N. Y.* 343), overruled;[²] *Anthony v. Wood* (29 *Hun*, 239), reversed.[³]
(Decided June, 1884.)

Appeal by plaintiff from an order granting motion by the sheriff of the city and county of New York, that he be made a party defendant, also from a judgment in his favor.

This action was brought to foreclose a mortgage executed by the defendant Wood, to one John P. Brooks, to secure the payment of a certain note, and by said Brooks assigned to the plaintiff.*

The respondent Bowe, late sheriff of the city and county of New York, petitioned to be joined as a defendant, alleging that the title to the note and mortgage were in him, by virtue of the proceedings under a certain attachment issued to him against the property of said Brooks, and that the assignment to the plaintiff was fraudulent, and praying a foreclosure and sale under the mortgage and the payment of the proceeds to him to be held under the attachment.

This motion was granted, and upon the trial, judgment was given in his favor for the relief he asked for. From the order granting the motion and said judgment this appeal was taken.

It appears that in an action in the supreme court, New York county, brought by one Helen L. Hall against said John P. Brooks, an attachment against his property was issued on the ground that he was a non-resident of the state, and delivered to the respondent Bowe, as sheriff of the city and county of New York, for service; that at that time the note and mortgage in question were in the possession of one Clark Brooks, an attorney, and were kept in the safe of another attorney, whose office was in the building in which the office of Clark Brooks was; that on the re-

* Reported below, 29 *Hun*, 239.

Anthony v. Wood.

ceipt of the warrant of attachment, one of Bowe's deputies served a copy thereof, with the usual notice, and also made special demand for the note and mortgage upon Clark Brooks, who refused to deliver the same to the officer; that a few days after the service of the warrant the bond and mortgage were transferred to plaintiff by John P. Brooks, the same remaining, however, in the custody of Clark Brooks, whereupon, proceedings were instituted to compel the delivery of the note and mortgage to the sheriff, which resulted in their delivery to the sheriff (*vide* Hall v. Brooks, 25 Hun, 571; *aff'd* 2 N. Y. Civ. Pro. 198).

James L. Bishop, for appellant.

Malcolm Graham, for respondent

FINCH, J.—If one proposition of the respondent is sound it settles in their favor every serious question raised on this appeal. That proposition is, that under the existing provisions of the Code of Civil Procedure a promissory note is made property capable of manual delivery, which may be levied upon so as to effect a lien upon the debt which it represents by taking it into the officer's actual custody, and that he may protect and defend that levy and lien by assailing as fraudulent a previous assignment or transfer to a third party.

Under the earlier provisions of the Code a levy upon property capable of manual delivery, executed by taking it into the actual possession of the officer, invested him with right, in defense of his levy, to assail as fraudulent and void against creditors, a previous assignment or transfer which threatened, by its priority, the security of the lien obtained (*Rinchey v. Striker*, 28 N. Y. 45). But this court also held, as to the levy permitted to be made upon choses in action, that

Anthony v. Wood.

the attachment reached and became a lien upon only such debts as at the time belonged to the debtor by a legal title, and for the recovery of which he could maintain an action at law, and, as a consequence, where before levy of the attachment he had parted with the legal title, even if with intent to defraud his creditors, there remained in him, for their benefit, only an equity which the attachment could not reach, and so the sheriff could not assail the transfer as fraudulent. The doctrine of *Thurber v. Blanck* (50 *N. Y.* 80), went to that extent, and has been since approved (*Castle v. Lewis*, 78 *N. Y.* 131; *Wait on Fraudulent Conveyances*, § 86). These authorities establish that the [1] sheriff in the case before us could not assail as fraudulent the transfer of the note and its collateral, made prior to his asserted levy, unless their doctrine is made inapplicable by the change in the provisions of the Code (§ 649). Where the property sought to be attached is "capable of manual delivery, including a bond, promissory note or other instrument for the payment of money," the levy is now to be made "by taking the same into the sheriff's actual custody."

This provision changed merely the mode of making the levy, but in no respect altered the inherent character of the property sought to be attached. If the note or bond has been transferred, however fraudulently, no lien by attachment is possible, and it is of no consequence that the mode of executing the process has been changed. The note is not turned into a chattel by the new provision. It remains a chose

in action, and when the legal title is in the attachment debtor, the debt may be seized by taking the [2] note or bond which is its evidence, but where the legal title has been transferred to a third party and is not in the debtor to be attached, the possession of the note by the officers under his warrant accomplishes nothing. On the assumption, therefore, that no levy

Anthony v. Wood.

was made until after the transfer of the note, the attachment gave the officer no right to assail or contest it.

['] But it is claimed that the levy made by taking the note into the officer's custody relates back to the demand made by him upon Clark Brooks, who had the possession of the paper, and which occurred before the note was transferred. The warrant was issued May 28, 1881; on June 2, the officer called upon Clark Brooks, who was the agent and attorney of the defendant and had the note in his custody locked up in a friend's safe, served upon him a certified copy of the warrant together with a copy of the affidavits, and demanded the note and bond and mortgage and certificate that he held them for the benefit of the defendant. Brooks refused. Thereupon he was ordered to submit to an examination, which took place on June 7. The assignment of the note and mortgage was dated the day before, but recorded on the same day. In July a motion to compel Brooks to deliver up the note was denied at special term, but the order was reversed by the general term, which directed him to deliver up the securities to the sheriff. This he did under protest.

It was said, in *Bills v. Nat. Park Bank* (89 N. Y. 343), to have been the law that a debt evidenced by a negotiable security could be attached while in the hands of the attachment debtor by serving the attachment upon the maker of the security; but the effect of sections 648 and 649 of the Code of Civil Procedure was not considered. Section 649 prescribes ['] how the levy shall be made. It must be "by taking the same into the sheriff's actual custody," who must "thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant and of the affidavits upon which it was granted." No other mode is prescribed. Nothing else will constitute the levy. Until the

McGean v. MacKeller.

['] officer has obtained the actual custody, he has made no levy and can make none. He is armed with power to get such custody. He may proceed by action or special proceedings to reach that result; but until he has reached it he has made no levy and can make none. We have nothing to do with the wisdom of the rule. We can only enforce it as it is plainly written.

It follows that neither before nor after the assignment did the sheriff acquire any title or lien upon the note or bond and mortgage; that he had no interest in the foreclosure or right to intervene, and that [°] the judgment and interlocutory order appealed from should each be reversed and judgment of foreclosure ordered in favor of the plaintiff, with costs.

All concur, except RUGER, Ch. J., not voting.

McGEAN v. MACKELLAR.

N. Y. SUPERIOR COURT, CHAMBERS, AUGUST, 1884.

§§ 811, 1326; Laws 1881, ch. 486.

Undertakings—approval of.—Corporate guaranty.

Under the provisions of chapter 486, Laws 1881, authorizing certain corporations to guarantee bonds and undertakings in judicial proceedings, &c., the undertaking must be executed by the party in whose behalf it is offered, and it is not enough that such corporation executes it. Section 811 Code Civ. Pro. does not apply to cases of this kind.

Upon justification on the part of the company by its officers, though it may appear that the company is in the condition described by section 3 of the act, it is the duty of the judge in each case, to exercise his discretion as to whether the actual state of the company's

McGean v. MacKellar.

business justifies the approval of the undertaking ; and where it appears that the company has been in the habit of guaranteeing bonds and undertakings, issuing policies of insurance, etc., and the officers are unable to give satisfactory information as to the aggregate amount of such risks, approval of the undertaking should be withheld.

(Decided August 13, 1884.)

Motion for approval of undertaking on appeal.

The facts appear in the opinion.

John Brooks Leavitt, for the motion.

George M. MacKellar, opposed.

O'GORMAN, J.—The plaintiff desiring to appeal to the court of appeals, presents for my approval an undertaking executed by a corporation claiming authority under chapter 486, Laws of 1881, to guarantee the fulfillment of the conditions of undertakings on appeal. The counsel for the respondent objects to the undertaking of this corporation, as now offered, on the grounds,

First. Because it is not given by the appellant.

Second. Because the examination of the secretary of the corporation does not show that its liabilities do not exceed its assets.

The first of these objections should, in my opinion, be sustained. The appellant himself should execute the undertaking on appeal, and his undertaking may according to the provisions of section 1, chapter 486, Laws of 1881, be accepted by the officer, on whom is imposed the duty of approving of such undertakings, "whenever the conditions of such undertaking are guaranteed by the corporation."

The provisions of section 811 of the Code of Civil Procedure do not seem to me to apply to cases of this kind.

McGean v. MacKellar.

The second and more important objection is, whether on the evidence before me in this case, and in the exercise of the judicial discretion which in each case it is my duty to exercise, I should approve of the undertaking offered, as a sufficient compliance with section 1326 of the Code of Civil Procedure.

By section 1 of the act of 1881 above referred to provision is made for justification on the part of the company, through its officers, as required by law of other sureties. It is provided by section 2 that the guaranty of any such company shall not be accepted whenever its liabilities shall exceed its assets, as ascertained in the manner provided in section 3 of the act. The "manner provided" in section 3 is that the outstanding indebtedness shall be charged as liabilities.

Following this manner of ascertaining the liabilities of the company, and in strict and technical accordance with the terms of said sections 2 and 3, the secretary had stated figures showing a surplus of assets in the company of \$105,122.29.

It is in evidence, however, that this company has been in the habit, not only of guaranteeing bonds and undertakings on appeal and the fidelity of the public and private affairs, but has also issued policies of insurance against accidents endangering human life, against breakages of plate glass, against explosions of boilers, &c. ; and how many of such policies have been issued and are now in force, and what is the aggregate amount of risks thus incurred and the amount of liabilities therefor, the secretary in his examination was unable to state, and I am not informed.

In the case of Earle v. Earle,* decided by the gen-

* EARLE, RESPONDENT, v. EARLE, APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM, JANUARY, 1883.

Decided February 5, 1883.

Appeal by plaintiff from order approving undertaking given by

McGean v. MacKeller.

eral term of this court, in which case the questions now before me were considered, the court says, "although the company may be in the condition described the defendant on an appeal from the general term to the court of appeals.

The undertaking was signed by the defendant. No sureties were given, but the performance of the undertaking was guaranteed by a corporation called the Fidelity and Casualty Company.

Carlisle Norwood, Jr., for appellant.

John M. Martin, for respondent.

Moore, Low & Sanford, for the Fidelity and Casualty Co.

SEDGWICK, Ch. J.—My construction of the act is as follows: If a bond or undertaking is proposed which is to be secured by the guarantee of the company, the party opposed may require "a justification on the part of such company, through its officers, as required by law of other sureties." If it should appear on such justification that, "its liabilities exceed its assets, as ascertained in the manner, provided in section 3 of this act," the act forbids the acceptance of the guarantee. The alternative is not that the court shall approve absolutely and under all circumstances. As stated in the first section, the court must exercise its judicial discretion to determine whether the financial condition of the company would justify an approval. I do not think that the act implies that the company *must* possess the qualification required of sureties, although the manner of justification is to be the same as where sureties justify. The nature of the business makes it clear that the legislature knew that such qualifications could not exist. If the legislature intended that the company should show such qualifications, it was not necessary to provide anything further on the subject, and especially to prohibit the approval of the undertaking if the company's condition did not reach the standard specified by the third section. But although the company may be in the condition described by section 3, it is the duty of the judge to exercise his discretion in each particular case, as to whether the actual state of the company's business justifies an approval of the undertaking.

It may be that in the present case the court did not exercise the discretion referred to. If it did not, the general term should make the order, that would be called for by the particular circumstances. In my opinion, the circumstances called for an approval of the undertaking, which was actually approved below. There should be no costs on the appeal to either party.

Order affirmed, without costs.

TRUAX and O'GORMAN, JJ., concurred.

Ansonia Brass, &c. Co. v. Conner.

in section 3, it is the duty of the judge in each particular case to exercise his discretion as to whether the actual state of the company's business justifies the approval of the undertaking."

Following that rule, in the propriety of which I concurred, I find myself in this particular case without sufficient information as to the actual state of the company's business, and therefore unable to approve of their undertaking.

THE ANSONIA BRASS AND COPPER Co., AP-
PELLANT, v. CONNER, SHERIFF, ETC.,
RESPONDENT.

N. Y. COMMON PLEAS, GENERAL TERM, MARCH, 1884.

§ 1366.

*Sheriff—time to return execution.—Extension by stay of proceedings.—
Admissions.—Evidence.*

On the mere question whether the time in which the sheriff is to return an execution, is extended by an injunction order restraining him from interfering with the property levied on,—no substantial harm resulting to the execution creditor therefrom,—courts should hold that he is entitled to the benefit of his obedience to the mandate of the courts, notwithstanding any doubts as to its jurisdiction or powers in the premises.^[2]

Accordingly, *held*, that an injunction order of the United States court in bankruptcy, staying the sheriff's proceedings, operates to extend the time within which he is bound to return the execution, by as many days as he was under stay.

An admission made upon which a new trial is based is admissible in evidence against a party making it, on a new trial of the action.^[1]
(Decided May 22, 1884.)

Ansonia Brass, &c. Co. v. Conner.

Appeal by plaintiff from judgment of general term of city court affirming judgment of trial term dismissing complaint.

Action for failure to return execution against Charles G. Wilson's property after sixty days from the receipt thereof. Defenses, among others, that proceedings of defendant were stayed by injunction issued by the United States district court, as follows :

**"UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK.**

**"In the matter of Charles G. Wilson, a bankrupt
—In bankruptcy.**

"On reading and filing the annexed affidavit of Charles G. Wilson, who has been declared a bankrupt, it appearing to my satisfaction that said Charles G. Wilson has been adjudicated a bankrupt, a merchant residing and carrying on business in the southern district of New York for more than six months, and that the Ansonia Brass and Copper Company have, by confession, procured a judgment against said bankrupt, and has execution thereon against, and have levied upon the property of said bankrupt, and thereby are seeking a preference over the other creditors of said bankrupt, and that Le Post Hubbell, Fred. Hubbell and Dorcas Stiles are seeking to procure a preference, &c.

"Now, it is ordered that said Ansonia Brass and Copper Company, plaintiff in said judgment, and said Le Post Hubbell, Fred. Hubbell and Dorcas A. Stiles, and said William C. Conner, sheriff, their servants, agents, attorneys and employees are, and each of them is, hereby restrained and enjoined from interfering in any way with the said property of said Charles G. Wilson, a bankrupt, not exempt by act of Congress approved March 2, 1867, and the acts amending the same,

Ansonia Brass, &c. Co. v. Conner.

from the operation of said acts, and from any interference therewith until the further order of this court.

“Witness, Honorable Samuel Blatchford, Judge of said Court of the United States, at the United States court-room, in the city of New York and district aforesaid, this 27th day of November, 1875.

[L. S.]

GEO. F. BETTS, Clerk.”

And that said order was granted upon affidavit of the bankrupt, the execution debtor, and was not vacated until December 14, 1875; that the sale of property levied upon by the sheriff was postponed until said order was vacated, and thereafter, on December 17, the property was sold, &c.

Marshall P. Stafford, for appellant.

Vanderpoel, Green & Cuming, and *Henry Thompson*, for respondent.

J. F. DALY, J.—When this case was last before us on appeal we held that it was prematurely brought; that the injunction order of the United States district court stayed the sheriff's proceedings, and operated to extend the time in which he was bound to make return of the execution by as many days as he was under stay (*Ansonia B. & C. Co. v. Conner*, 3 *N. Y. Civ. Pro.* 88). We so held upon an admission in the case on appeal, made upon the trial by plaintiff, that by order of said district court, the sheriff was enjoined and restrained “from all further proceedings under the said execution until the further order of the court, and that said order remained and was in full force and effect until the 14th day of December 1875.” On the new trial that admission seems to have been withdrawn, and the order of the district court was put in evidence; as to which order plaintiff now raises the question whether

Ansonia Brass, &c. Co. v. Conner.

its legal effect was to stay the sheriff and his proceedings. Why the plaintiff was permitted to withdraw his original admission on which the former decision ['] of this court was based, does not appear, for it was available to defendant upon the new trial (1 *Philip's Ev.* 524 marg. p.; 1 *Green. Ev.* § 186). We are now, however, called upon to determine the effect of the order as read in evidence.

The district court had power to make orders enjoining any disposition of the bankrupt's property, in the form and to the effect of the order proved in this case. (*U. S. Rev. Stat.* 5024.) This particular order forbade interference with the identical property held by the sheriff. Authorities are cited to show that the court had no power to make such an order except in an action instituted for the express purpose of attacking the judgment (*Smith v. Mason*, 14 *Wall.* 419 ; *Marshall v. Knox*, 16 *Id.* 551), and that a transferee of the bankrupt so enjoined would not have been liable for the contempt if he disobeyed such an order (*In re Marter*, 8 *N. B. R.* 188). In the case of *Ansonia B. and C. Co. v. Babbit* (8 *Hun.* 157), it was held by the supreme court that notwithstanding an order of the district court, enjoining the sheriff from further proceedings, he had the right to go on and sell the property, being accountable only for the surplus to the assignee, and was not justified in giving up the property to the United States marshal.

In the same case in the court of appeals (74 *N. Y.* 395), that court does not go further than to say that the order "assuming that it was binding on the sheriff who had no notice of the application for the order and was not heard in respect to it, did not assume to disturb his possession," and that it was his duty to retain the possession and sell the property to satisfy the execution and to take all reasonable means to protect his levy. It is not held that such an order would not ex-

Ansonia Brass, &c. Co. v. Conner.

cuse the sheriff so far as making his return within the statutory time is concerned, if he obeyed and respected it until it was regularly set aside, a course of proceeding which the decent administration of justice required of the officer. That is the only question we have to deal with here, and I am inclined to adopt the [?] views expressed in the city court on this point by Chief Justice McADAM at general term, and by Justice HALL at trial term, that on the mere question whether the time in which the officer was to make his return was extended by the injunction order, no substantial harm resulting therefrom to the execution creditor, courts should hold that he was entitled to the benefit of his obedience to the mandate of the court, notwithstanding any doubts as to its jurisdiction or powers in the premises.

The judgment should be affirmed, with costs.

Should the appellant desire to have the decision of the court of appeals on the questions of law not definitely settled by its decisions—

1. Whether a stay of the sheriff's proceedings operates to extend the statutory time for making return on the execution ; and,

2. Whether the order in question, having been obeyed by the sheriff until regularly vacated, operated as such a stay.

I am willing to make an order authorizing an appeal for that purpose.

LARREMORE and VAN HOESSEN, JJ., concurred.

Apsley v. Wood.

APSLEY v. WOOD.

SUPREME COURT, SECOND DEPARTMENT, GENERAL
TERM, SEPTEMBER, 1884.

§§ 776, 827.

Renewal of motion.—*What is new proof.*—*Report of referee to take proof on motion.*—*When should stand.*

Where a motion to set aside a judgment taken by default, on the ground that the summons had never been served, was denied, with leave to renew upon new papers, and the defendant thereafter renewed the motion upon the same papers, and additional affidavits, impeaching the character of the plaintiff and averring that he was a person likely to procure a false affidavit of service; that he had a bad character, had been arrested for crime and had been found guilty of procuring a deed by fraud,—*Held*, that the plaintiff's objection and that no new facts were presented on the renewal motion was untenable that the additional affidavit did furnish new facts of weight.

Although the report of a referee appointed to take proof on a motion is not subject to as strict a rule in respect to the result upon the disputed question of fact as upon the issues in an action tried before him, yet the report should stand even if only fairly supported by the evidence.

(*Decided September, 1884.*)

Appeal by defendant from order dated February 28, 1883, denying his motion to set aside a judgment taken against him by default; also appeal by plaintiff from an order setting aside said judgment.

The judgment in question was for \$3,161.44 and was entered on defendant's failure to appear or answer on December 14, 1883. It is asserted by plaintiff that the summons was served by one Samuel B. Rogers, a real estate broker, doing business in the city of New

Apsley v. Wood.

York. The defendant denied that he had ever been served with a summons in the action and claimed that the affidavit of Rogers in that behalf was wholly false; and made a motion to set aside the judgment for that reason. The affidavits were conflicting and the court ordered a reference to take proof. The referee reported the evidence with his opinion that there had been no service of the summons on the defendant in the action. A motion to confirm the referee's report and to set aside the judgment was made at special term, based on the affidavits and the evidence taken, and on said report. Said motion was denied by the court, with \$10 costs and all disbursements, amounting together to \$75. The order denying said motion contained the provision that "the defendant be allowed to apply to the court upon such other papers and affidavits, as he may be advised, to set aside the said judgment and to defend the action."

The defendant without paying or tendering the costs, immediately renewed the motion upon the same papers which were the basis of the former motion, and upon the additional affidavit of the defendant in which he charged plaintiff with various crimes and offenses: in substance that, "plaintiff had been arrested by various persons in Lockhaven, Penn., and in Boston, Mass.; that he had been arrested for larceny, false pretenses, embezzlement, forgery, &c."

The motion was granted and the defendant allowed to serve an answer. From the order thereupon entered the plaintiff appealed, whereupon the defendant appealed from the order denying his original motion.

Other facts are stated in the opinion.

Anson B. Moore and *Andrew J. Moore*, for the plaintiff.

The statements in the moving affidavit of the defendant in regard to plaintiff's character, were clearly

Apsley v. Wood.

incompetent, immaterial and inadmissible for any purpose; they were scandalous in the extreme, and should have been stricken out on motion then and there made.

The plaintiff was an attorney and counselor at law, an officer of the court, and was entitled to its protection. The statements therein were interposed for the purpose of disgracing and degrading the plaintiff, and to prejudice the court against him and his rights, and were calculated to have that effect, and this court cannot see that it did not have the effect to induce the court below to set aside the judgment. The plaintiff had not been sworn as a witness, nor had he made an affidavit in opposition to the motion, hence the impeaching affidavit was incompetent evidence for any purpose.

Evidence that a witness has been indicted for perjury and for forgery is inadmissible to impeach his credibility. *Jackson v. Osborn*, 2 *Wend.* 555; *People v. Gay*, 7 *N. Y.* 378; 59 *Barb.* 619; 49 *Id.* 342; *People v. Herrick*, 13 *Johns.* 82; 1 *Greenleaf on Evidence*, 457-463; 15 *Hun*, 269; *Newcomb v. Griswold*, 24 *N. Y.* 298, Opinion by ALLEN, J., 299; 3 *Wail's Pr.* 142; *Lee v. Chadsey*, 3 *Keyes*, 225; *Warrell v. Parmley*, 1 *N. Y.* 519; *People v. Wiley*, 3 *Hill*, 193; *Conway v. Conway*, 6 *N. Y.* 97; *La Beau v. People*, 6 *Park. Crim. R.* 371; *Varona v. Soccaras*, 8 *Abb. Pr.* 302; *Griston v. Smith*, 1 *Daly*, 380; *Real v. People*, 42 *N. Y.* 270; *People v. Crapo*, 76 *Id.* 288; *Jackson v. Lewis*, 13 *Johns.* 504.

The motion to set aside the judgment and to defend the action should have been denied and the order granted in pursuance thereof, should be reversed.

This is a renewal motion upon the same state of facts. It is the settled practice in this state that where a motion has been once heard, considered and denied, it cannot be renewed on the same state of facts. *Mills*

Apsley v. Wood.

v. Thursby, 11 *How. Pr.* 114; *People v. Mercein*, 3 *Hill*, 416. And see *Gatherhead v. Bromley*, 7 *T. R.* 455; *Simpson v. Hart*, 14 *Johns.* 63; *Schuman v. Weatherhead*, 1 *East*, 537; *Allen v. Gibbs*, 12 *Wend.* 202; *Dollfus v. Frosch*, 5 *Hill*, 493, note "A" to above case; *Hoffman v. Livingston*, 1 *Johns. Ch.* 211.

The defendant was bound to present in his first motion all necessary facts in his possession or within his knowledge to entitle him to any relief that he could or would be entitled to under any circumstances.

No new state of facts being presented in the second motion, not known to the defendant and duly presented in the first, the second motion was properly met by the established practice that, "a party complaining of any proceeding in a cause, must embody all objections then existing in one motion; he cannot make a separate motion for each objection." *Patterson v. Bacon*, 21 *How. Pr.* 478; *Desmond v. Wolf*, 1 *Code. R.* 49; *S. C.*, 12 *Abb. Pr.* 142; *Schaumer v. Ingelstein*, 19 *How. Pr.* 412-413; *Simpson v. Hart*, 19 *Johns.* 72; *Smith v. Spaulding*, 3 *Robt.* 615.

A motion can only be renewed upon *new grounds* and not upon mere additional or cumulative papers. *Bascom v. Feazler*, 2 *How. Pr.* 16; *Ray v. Conner*, 3 *Edw. Ch.* 479.

Leave to renew a motion will not be granted to enable a party to present facts, which were known to him at the time of his original motion. *Lovell v. Martin*, 12 *Abb. Pr.* 178.

A motion once denied cannot be renewed as a matter of right, except upon a different state of facts arising subsequent to the decision of the former motion. *Bank of Havana v. Moore*, 5 *Hun*, 624; *Bolls v. Duff*, 56 *Barb.* 567; 38 *How. Pr.* 492; 7 *Abb. N. S.* 385; 52 *Barb.* 637; 6 *Abb. N. S.* 442; *Riggs v. Russell*, 74 *N. Y.* 370.

Apsley v. Wood.

E. D. Childs and *C. M. Stafford*, for defendant.

The granting of the order appealed from by the plaintiff, rests in the legal discretion of the judge before whom the motion was made and decided, and being a discretionary order it is not appealable. *Martin v. Gould*, 41 *Super. Ct. (J. & S.)* 544; *Mead v. Mead*, 2 *E. D. Smith*, 223; *Churchill v. Mallison*, 2 *Hill*, 70; *Bolton v. Depeyster*, 3 *Code R.* 141; *Carpenter v. Carpenter*, 4 *How. Pr.* 139.

BARNARD, P. J.—This appeal is based upon an apparently contradictory decision at special term upon the same substantial facts. Upon December 14, 1882, the plaintiff entered up a judgment against the defendant for \$3,161.44 by default. The roll shows that the summons was served by one Rogers. The defendant denied that he had been so served, and made a motion to set aside the judgment for that reason. The affidavits were conflicting and the court ordered a reference to take proof. The referee reported that there had been no service of the summons. The special term, upon the report being returned, denied the motion with a leave to renew. The motion was renewed upon an affidavit which impeached the plaintiff's character, and upon the same papers which had been the basis of the former motion. The court set aside the judgment so far as to permit an answer to be served. The defendant did answer and the plaintiff appealed; the defendant then appealed from the order refusing to set aside the judgment. The plaintiff moves to dismiss that appeal because the defendant renewed the motion and took a benefit under the subsequent order, and is therefore bound to submit to the former order. Upon the appeal from the second order by plaintiff he claimed to reverse that, because the rehearing was improper upon the same fact. If the second order is reversed because it was improper to have the motion

Apsley v. Wood.

a second time heard, and the appeal from the first order by the defendant, is dismissed, because he is estopped by the second order, the defendant will be without the power to present his case upon appeal. We think the claim made by plaintiff as to the illegality of the renewed motion untenable. The right to renew was reserved by the order denying the first motion. The additional affidavit of defendant did furnish new facts of weight upon the renewed motion. The plaintiff was stated to be a person likely to procure a false affidavit of service. That he had a bad character; had been arrested for crime, and had been found guilty of procuring a deed by fraud. The report of the referee is abundantly sustained by the evidence. The parties to the occurrence disagree. Rogers says he served the paper. Wood denies the service. The surrounding facts are in favor of defendant's testimony. Rogers was a real estate broker and not a person who was accustomed to serve papers. The claim is a large one and the plaintiff delayed some three months after he could have entered judgment. Rogers says he served two papers at the same time; one was the summons in this case, and the other a summons and complaint in the Kings county court. The defendant employed an attorney in due time to defend in the county court and although he denies any debt in this case, and although he had a store well stocked, in Brooklyn, in his possession, he waited until the sheriff came with the execution before making any defense. Although the report of the referee is not subject to as strict a rule in respect to the result upon the disputed question of fact as upon issues tried, yet the report should stand, even if only fairly supported by the evidence. A referee has the benefit of the aid derived from the inspection of the witnesses and of their manner upon the stand as well as upon the trials of issues in actions. Assuming that the defendant had

Stern v. Moss.

failed to remember the service, he was still entitled to answer if he had a defense, but we think the summons was never served, from the evidence and report of the referee.

The order should be modified by striking out the consent upon plaintiff's part to refer. It should be left optional with him to refer or not, as thus modified this order appealed from is affirmed, with costs and disbursements.

The appeal taken by defendant from the denial of the motion to set aside the judgment, should be dismissed with costs.

PRATT and DYKMAN, JJ., concurred.

STERN, APPELLANT, v. MOSS, RESPONDENT.

N. Y. COMMON PLEAS, GENERAL TERM, MARCH, 1884.

§§ 549, 550, 2894-2904, 3209-3211.

Execution against person in district courts.

Where an action is brought in the district court of New York city, upon contract, and an order of arrest is granted upon affidavits showing facts extrinsic to the cause of action, which order is not vacated, to entitle plaintiff to judgment and an execution against the person, he need only prove his contract claim.

(Decided June 30, 1884.)

Appeal by plaintiff from judgment of district court of New York city.

A summons and order of arrest in this action were served upon the defendant, and on August 3, 1883, the

Stern v. Moss.

parties appeared in court and issue was joined between them. The pleadings were oral. The complaint was for goods sold and delivered, and the answer was a general denial. A motion was made to vacate the order of arrest which was granted upon extrinsic facts set forth in affidavits showing that the goods were obtained upon false and fraudulent representations. Counter affidavits were made in opposition thereto. On August 4, 1883, the motion to vacate the order was denied, and the trial of the action was adjourned to August 8, 1883, when it was tried before Justice ANGEL (sitting in place of Justice McGOWN), who, on August 15, 1883, rendered judgment for the defendant, dismissing the action, with costs.

Upon the trial the plaintiff only proved the sale and delivery of the goods in question and non-payment therefor. The defendant offered no proof, but moved to vacate the order of arrest for want of proof to sustain it. The plaintiff insisted that upon the evidence, as it stood, he was entitled to a money judgment for the value of the goods, together with the direction therein, the words, "defendant liable to execution against his person."

From the refusal of the justice to insert such direction and from the judgment rendered this appeal is taken.

Louis H. Mayer, for appellant.

Jacob A. Canton, for respondent.

PER CURIAM.—The justice in a well considered opinion, refers to *Coles v. Hannigan* (8 *Daly*, 43) as authority for his decision. In that case the action was commenced by a warrant of arrest in the first instance, pursuant to subdivision 3, section 16, chapter 346 of the Laws of 1857. The process used determined the

Stern v. Moss.

character of the action, and as the fraud was not denied, nor any motion made to vacate the arrest, it was held the defendant was liable to arrest upon execution upon proof only of his indebtedness. But section 10 of the act of 1857, allowing the commencement of an action by a summons, warrant or attachment, was repealed by section 3209 of the Code of Civil Procedure, which provides that an action brought in the district courts must be commenced by voluntary appearance of the parties or by the service of a summons.

By section 3210 of the Code, article 3, chapter 19, is made applicable to the district courts. This article includes sections 2894 to 2904, subject to the qualifications mentioned in section 3211. This latter section provides that existing statutes in relation to the district courts, which are not repealed, shall still be applicable as to the manner of applying for, granting and executing an order of arrest, &c.

As an action in these courts must now be commenced by a summons, it would appear that an order of arrest therein is to be regarded as a provisional remedy somewhat analogous to the practice under section 179 of the old Code of Procedure, where the action on contract might be prosecuted irrespective of the right to arrest upon extrinsic facts.

Sections 549 and 550 have no application to arrests in the district courts of the city of New York, and subdivision 4 of section 549 is the only statute that requires that fraud in contracting the debt shall be proved upon the trial, if the plaintiff suing to recover money due upon a contract seeks the arrest of the defendant. Before the enactment of subdivision 4 of section 549, it was never necessary that the plaintiff should allege in his complaint and prove at the trial that the debt that he sued to recover was fraudulently contracted. His cause of action was an ordinary money demand, and the fraud used by the defendant in in-

Stern v. Moss.

curing the debt was a circumstance extrinsic to the cause of action to be proved by affidavit if the plaintiff attempted to arrest the defendant. Upon his arrest the defendant was at liberty to move upon affidavits to vacate the order of arrest, and the question of the defendant's liability to arrest was always decided upon affidavits where the ground of arrest was extrinsic to the cause of action. Though the subdivision we have mentioned has introduced a new rule in courts of record, the practice in the district courts has not, as we have said, been affected by it. Section 1304 of the consolidation act prescribes the case in which an arrest may be had in an action in the district court. When arrested, the defendant may move upon affidavits to vacate the order of arrest. The very point was decided in *Johnson v. Florence* (32 *How. Pr.* 230). Where the original process was a warrant, the setting aside of the warrant put an end to the action; but the order of arrest obtained under 1304 of the consolidation act is merely a provisional remedy which may be vacated without affecting the summons or the right of the plaintiff to proceed with the action, in order that he may recover judgment for his demand.

Where the order of arrest is sustained, the plaintiff is entitled to an entry in the judgment, if he recover one, that the defendant is subject to arrest and imprisonment thereon (§ 1386 of the consolidation act; *Coles v. Hannigan*, 8 *Daly*, 43). The execution is then to be issued in accordance with the provisions of section 1399.

The judgment appealed from and the order vacating the order of arrest should therefore be reversed and a new trial ordered, with costs to the appellant to abide the event.

In order to prevent misconception, we will say that section 3018 is not now before us, but we do not think

Sniffin v. Peck.

it has any bearing upon the question that we have passed upon on this appeal.

LARREMORE, P. J., J. F. DALY and VAN HOESSEN, JJ., sitting.

SNIFFEN, APPELLANT, v. PECK, RESPONDENT.

CITY COURT OF NEW YORK, GENERAL TERM, SEPTEMBER, 1884.

§§ 531, 781, 783.

Time to answer.—Stay of proceeding not extension of.—Specifying irregularities in order to show cause.

Where a defendant, after his time to answer had expired, obtained an order that the plaintiff serve a bill of particulars of his claim, or show a cause on a day therein named, why he should not be required to do so, and staying his proceedings until the further order of the court, and the plaintiff thereupon served a bill of particulars; obtained an *ex parte* order vacating the stay and entered judgment.—*Held*, that the plaintiff had a legal right so to do; that the stay of proceedings did not operate as an extension of time to answer.

An order granting a motion to vacate and set aside a judgment is objectionable when no specific grounds of irregularity were specified in the order to show cause on which it was made.

(Decided October 24, 1884.)

Appeal from an order vacating and setting aside, as irregular, the judgment entered herein.

This action was commenced May 17, 1884, by the service of the summons and notice upon the defendant to recover \$225.61 on an account stated.

The defendant appeared in person May 19, 1884, and

Sniffin v. Peck.

demand service of the complaint—service whereof was made upon him on May 22, 1884.

On May 31, 1884, and after his time to answer had expired, the defendant obtained from Mr. Justice NEHRBAS an alternative order requiring plaintiff to serve “a bill of the particulars of the account, in respect whereof this action is brought” or show cause; this order also contained a stay of plaintiff’s proceedings “until the further order of this court,” but it did not contain any extension of the defendant’s time to answer, which had expired three days previous.

June 4, 1884, the plaintiff served upon the defendant’s attorney a copy of the account stated alleged in the complaint, and thereupon an order was made and entered by Mr. Justice HYATT vacating the stay contained in the order of May 31, 1884, and thereafter on the same day judgment for want of an answer was entered against the defendant for \$257.74.

The defendant thereupon moved to vacate said judgment as irregular. On the return of the motion the plaintiff interposed the preliminary objection that the motion papers did not disclose what the irregularity consisted of; this objection was overruled, and the motion was granted vacating the judgment as irregular, and from the order entered thereon this appeal was taken.

Russell Benedict, for appellant.

Where a motion is based upon an irregularity it must be specified in the notice or order to show cause. *People v. Kenney*, 2 *Hun*, 346; *Lewis v. Graham*, 16 *Abb. Pr.* 126; *Barker v. Cook*, 40 *Barb.* 254. Even though the affidavit disclosed an irregularity in the judgment—which it does not—this would be insufficient unless it was also set out in the order to show cause. *Montrait v. Hutchins*, 49 *How. Pr.* 105. The defendant’s time to answer expired on May 28, 1884; the

Sniffin v. Peck.

ex parte order of May 31, did not revive, extend or enlarge such time. The only method by which a defendant's time to plead can be extended beyond the statutory limit before it has expired is by consent or by an order of the court or a judge thereof made upon proper affidavit containing the matters required by the Code and general rules of practice including an oath to the merits. When the time has already expired, the only remedy of the defendant is to move for leave to come in and defend; this application must be made to the court. *Code Civ. Proc.* §§ 781, 783.

The order of May 31, 1884, made by Mr. Justice Nehrbas contained a stay of plaintiff's proceedings "until the further order of this court." This did not operate to enlarge or revive the defendant's time to plead; its only office was preventive or injunctive of plaintiff's proceedings, and therefore, when the "further order of this court" was made and entered on June 4, the stay became *functus officio*, and the plaintiff was immediately entitled to enter judgment against the defendant for want of an answer. *Platt v. Townsend*, 3 *Abb. Pr.* 9.

O. S. X. Peck, for respondent

BY THE COURT.—Whether the complaint was served on the 22d or 24th of May need not be considered. The judgment was entered June 4, and the defendant was then in default. The defendant obtained an order to show cause on May 31, with a stay of plaintiff's proceedings, but no order extending the time to answer was obtained. On June 4, Judge HYATT vacated the stay, and the plaintiff entered judgment. This he had a legal right to do. The stay of proceedings did not operate as an extension of the time to answer. *Platt v. Townsend*, 3 *Abb. Pr.* 9; *Romaine v. Cornwell*, 11 *Abb. N. S.* 430.

 Willmore v. Flack.

The order is also objectionable because no specific grounds of irregularity were specified in the order to show cause according to the rules of the supreme court.* The defendant's remedy was by an application to open the default. The order appealed from must, therefore, be reversed with costs, and with liberty to make such motion at special term as the defendant may be advised.

MCADAM, Ch. J., and NEHRBAS, J., concurred.

WILLMORE, APPELLANT, v. FLACK ET AL., EXECUTORS, ETC. OF CONNER, DECEASED,
RESPONDENTS.

COURT OF APPEALS, 1884.

§ 3191.

Appeal from N. Y. Marine (now City) Court to Court of Common Pleas.
—Consent to final judgment.—Jurisdiction.—Equity.

An appeal from an order of the general term of the marine court (now city court of New York), granting a new trial, is allowed only upon condition that the appellant consents to a final judgment against him if the order is affirmed,^[2] and without that consent the general term of the court of common pleas has no jurisdiction of an attempted appeal to it in such a case,^[1, 3] and any adjudication made by it thereon is void.^[3]

Where the court of common pleas was without jurisdiction of an appeal from an order of the marine court (now city court of New York), granting a new trial because no consent to final judgment, in case the order was reversed, was served with the notice of appeal,—*Held*, that as the consent was intentionally and consciously omitted and never given, but steadily and persistently refused, the

* *General Rules of Practice* ; Rule 37.

Wilmore v. Flack.

defect could not be corrected by an amendment *nunc pro tunc*;[⁴] that the fact that the appellant appeared in the appellate court and submitted the appeal to its jurisdiction did not estop him from raising the question of jurisdiction,[⁵] and his consent to its exercise did not confer it.[⁵]

The filing of a remittitur and the docketing in the N. Y. marine (now city) court, of a void judgment, rendered by the general term of the court of common pleas, does not give to it any new validity.[⁶,⁷]

Where a void judgment for costs was rendered on appeal against one "H.," a city marshal, in an action brought by him for the benefit of one "W." and for the costs of which "W." was liable under an indemnity-bond given by him to "H.,"—*Held*, that after exhausting his remedy at law for the reversal of such judgment W. might maintain an action in equity to set it aside.* [⁷,⁸]

Wilmore v. Flack (16 N. Y. Weekly Dig. 236), reversed.
(Decided October 7, 1884.)

Appeal from a judgment, general term, first department, affirming a judgment dismissing plaintiff's complaint and an order denying plaintiff's motion for a resettlement.

Reported below 16 N. Y. Weekly Digest, 236.

This action was brought by James Wilmore "to annul and set aside" a judgment recovered by the defendant therein in a suit in the N. Y. marine court, brought by John H. Hillier, sole plaintiff, against William C. Conner, sole defendant, and to "annul and set aside" an order of the court of common pleas, in the same action, the plaintiff herein not being a party to the said action.

This suit is based on the following allegations of the complaint, viz.:

I. That an execution issued on a judgment obtained in the marine court in favor of the plaintiff, against one Levy, was delivered to one John H. Hillier, one of

* As to right of party in interest who is not party to action to intervene to protect his rights and set aside void proceedings, see U. S. Trust Co. v. N. Y. W. S. & B. Ry. Co., 6 N. Y. Civ. Pro. 90.

Wilmore v. Flack.

the marshals of the city of New York, for execution.

II. That Hillier, at the time, had in his possession property of Levy sufficient to satisfy the execution, and which property he had previously levied on as marshal under a prior execution, and also held it under an attachment.

III. That Conner, then sheriff, subsequently, under executions alleged to be void, took the property from Hillier by superior force of arms, sold it, and converted the proceeds.

IV. That in consequence thereof, plaintiff lost his said judgment, there being no other property on which to levy. That plaintiff had indemnified Hillier against the claims of Conner and all other persons to the property, and required him to proceed to satisfy the judgment of the plaintiff, notwithstanding the claims.

V. That plaintiff was about to sue Hillier for neglect but was persuaded not to do so, but to permit Hillier to sue Conner for conversion.

VI. That in pursuance thereof, Hillier sued Conner in the marine court, and a trial was had which resulted in the favor of Hillier against Conner, upon which judgment was entered.

VII. That Conner then appealed to the general term of the marine court, where the judgment was reversed and a new trial ordered.

VIII. Hillier then served a notice of appeal to the common pleas, and brought on the same to a hearing. That on his appeal he neither gave nor filed any stipulation or consent that if said order should be affirmed judgment absolute might be entered against him; but nevertheless, the common pleas, on hearing the appeal, not only affirmed the order, "but, contrary to law, and in excess of its power and jurisdiction," assumed to render judgment absolute against Hillier, and remitted the said judgment to the marine court. That in obedi

Wilmore v. Flack.

ence to the remittitur, judgment absolute was, April 7, 1880, entered in the marine court in favor of Conner and against Hillier for \$1,306.04, the costs of said action. [This is the judgment sought to be set aside in this action.]

IX. That from said judgment no appeal lies to any court. That the plaintiff is advised that the judgment is wholly without jurisdiction and void. That it is a bar to further proceedings in the action, and renders nugatory the order for a new trial. That the marine court has refused to vacate the judgment or permit a new trial, and that the common pleas has refused to permit an appeal to be taken from the judgment to the court of appeals. By the indemnity he (plaintiff) gave to Hillier, as he is advised, he is liable to pay the whole of the judgment. That Hillier is, as he is informed, insolvent, and no longer a marshal of the city. That shortly after commencing the said action, Hillier resigned as marshal, and was appointed by Conner a deputy sheriff, and acted as such during Conner's term of office as sheriff. That on such appointment Hillier manifested a desire to abandon the prosecution of the suit, disregarding the rights of the plaintiff, and even gave testimony on the first trial against the rights and interests of the plaintiff; and, as alleged, against the truth and afterwards he voluntarily made affidavits for Conner which were used in the action against the prosecution thereof. That he afterwards refused to permit the further prosecution of the suit unless the plaintiff further indemnified him, and plaintiff did thereupon indemnify him against anything which might result against his person by way of arrest or imprisonment on the further prosecution of the action. Notwithstanding this, Hillier afterwards furnished Conner's attorneys with an affidavit to be used by them, and which was used in opposing an application to the court of common pleas for leave to appeal,

Wilmore v. Flack.

which application was in consequence thereof denied. That Hillier and Conner, after Hillier's appointment, entered into a corrupt agreement or understanding that Hillier should aid Conner in the defense of the said action and make no active efforts to prosecute it to a successful termination. On the other hand, it was agreed that if Conner should succeed, no part of any judgment should be collected or demanded from the said Hillier.

X. That Conner died in April, 1881, leaving an estate and last will and testament, appointing the defendants Flack, W. C. and J. P. Conner, executors, who qualified.

XI. That Hillier has been requested to bring this action, but has refused to do so.

XII. That plaintiff has no adequate remedy at law.

As relief, plaintiff prays that the judgment recovered by Conner against Hillier April 7, 1880, in the marine court for \$1,306.04, be annulled and set aside, as well as the order of the court of common pleas directing the entry of judgment absolute in that action.

The defendants' answer, among other things, contained a second defense, as follows:

"Second defense.—And as a further, separate and distinct defense to the matters in the complaint contained, denying the same in manner and form as they are hereinbefore denied, these defendants, upon their information and belief, aver that the cause of action in the complaint alleged, if any, did not arise, accrue or happen within one year next preceding the commencement of the action.

To this defense the plaintiff demurred "on the ground that it is insufficient in law upon the face thereof, to constitute a defense."

On the demurrer coming on to be heard at special term, the defendants claimed that the second defense of the answer, running as it did to the whole complaint,

Wilmore v. Flack.

having been demurred to, it was competent for the defendants to attack the sufficiency of the complaint, which they did, on the ground that it did not state facts sufficient to constitute a cause of action. After consideration, the court decided the case in favor of the position taken by the defendants. Whereupon it was ordered that the demurrer be overruled, and that the defendant have judgment thereon for the dismissal of the plaintiff's complaint with costs, but with leave for plaintiff to withdraw his demurrer within twenty days upon payment of defendant's costs as the same should be taxed. Thereupon judgment was entered. Application was then made for a resettlement of the order, the plaintiff seeking to modify it in respect to its provisions with reference to the costs. This motion was denied, and the plaintiff appealed both from the order and from the judgment to the general term where the judgment and order were affirmed. Judgment of affirmance was entered from which judgment affirming the judgment dismissing plaintiff's action this appeal is taken.

Edward P. Wilder, for appellant.

The complaint is sufficient as invoking the equitable powers of this court to set aside the judgment of the marine court as void for want of jurisdiction. It appearing that no appeal or other remedy at law lies, and that the court is one of local and limited jurisdiction, its judgment is a proper subject of attack by such an action as the present. That the judgment is void for lack of jurisdiction see *People v. Talcott*, 21 *Hun*, 593; *Laws of 1874*, chap. 515, § 9; *Gordon v. Hartman*, 79 *N. Y.* 221, and that equity will interfere to set aside such a judgment or to restrain its execution or its operation in any way which would work injustice. See *Story's Eq. Jur.* §§ 885, 886, 887 and cases there cited.

The plaintiff is not estopped from invoking the

Wilmore v. Flack.

equitable interference of this court, from the fact that his trustee, Hillier, himself, took the appeal to the common pleas, which has resulted in the judgment complained of. It might be argued that he is estopped from questioning the jurisdiction of the common pleas in so far as related to an affirmance of the order appealed from, together with such incidents by way of costs as the law imposes in such cases. But the estoppel goes no further than the notice of appeal, and neither plaintiff nor Hillier can be estopped from complaining against the exercise of a jurisdiction which was not conferred nor invoked by that notice. The jurisdiction to render judgment absolute is derived not from the mere act of appealing, but from the "assent" that such a judgment may be rendered. As neither Hillier nor the plaintiff, who is his *cestui que trust*, ever gave such assent, how is plaintiff estopped from questioning the right of the court to render such a judgment? See same principle applied to an appeal from conviction for larceny, where the indictment charged both larceny and burglary. *Held*, that a reversal and new trial revived the charge of larceny only, and not that of burglary; upon the principle that the prisoner by appealing waived his privilege as to one, but kept it as to the other. Per FOLGER, C. J., in *People v. Downing*, 84 N. Y. 483-4. The right of appeal to the court of common pleas, from the order of the marine court, general term, granting a new trial is like that of an appeal to the court of appeals for a similar order of this court, and the same principles and authorities may be applied to the former as to the latter. See *McEteere v. Little*, 8 Daly, 167. The right of appeal in such a case to the court of appeals was first conferred in 1851. Prior to the amendments of section 11 of the Code of Procedure, in that year such orders were not appealable at all. The question had arisen whether they were not reviewable under the "general

Wilmore v. Flack.

powers" of the court, but a negative answer was given by the court of appeals. *Lansing v. Russell*, 2 *Comst.* 563; *Tilley v. Phillips*, 1 *Id.* 610; *Duane v. Northern R. R. Co.*, 3 *Id.* 545. . . .

The defendants' testator, if better advised than Hillier as to the law, ought to have moved to *dismiss the appeal* for want of that element of jurisdiction. (See *Rust v. Hauselt*, 69 *N. Y.* 485; 9 *Abb. N. C.* 150). Not having so moved, he must be taken to have acquiesced in the plaintiff's view of the scope of his appeal, and to have consented that in case the order should be affirmed, the only result of such affirmance would be to remit the case for a new trial. He had no right to go further and ask the court to do something which neither the statute nor any "assent" on the part of the plaintiff had given it power to do.

See *McMahon v. Rauhr*, 47 *N. Y.* 72; *People v. The Clerk, etc.*, 3 *Abb. Pr.* 309. . . .

"Consent cannot give jurisdiction to an appellate court." . . . *Henry v. Cuyler*, 17 *Johns.* 469; *Campbell v. Stokes*, 2 *Wend.* 146; *Dudley v. Mayhew*, 3 *N. Y.* 9; *People v. The Clerk, etc.*, 3 *Abb. Pr.* 309. The complaint is sufficient in that it invokes equitable jurisdiction on the ground of fraud and collusion between Hillier and Conner. Hillier undertook the suit against Conner for Wilmore's benefit and under Wilmore's bond of indemnity, and in pursuance of a special agreement with Wilmore. That he had a right to do this, see *Howland v. Willets*, 9 *N. Y.* 171; *Ansonia Co. v. Pratt*, 10 *Hun.* 443. The jurisdiction of equity to relieve against judgments secured by fraud and collusion is beyond question. *Story's Eq. Jur.* §§ 1574, 1575; *State of Michigan v. Phoenix Bank*, 33 *N. Y.* 24, 28, and cases cited. . . . It is no objection that plaintiff was not a party to the action of Hillier v. Conner, the judgment in which is sought to be set aside.

Either Hillier or plaintiff could even have brought

Wilmore v. Flack.

the original action, and whichever brought it, the other could have been restrained from bringing a similar action, on the ground that the law would not permit Conner to suffer from two actions, or the parties to have two recoveries against him. See *Howland v. Willets*, 9 *N. Y.* 174, and cases there cited; also *Code*, § 3249; *Giles v. Hyibert*, 12 *N. Y.* 31.

In the case last cited the judgment creditor, under whose execution the sheriff had brought the action, was held to be "immediately and directly interested in the levy, and the property or money acquired by virtue thereof," so much so that being the party for whose immediate benefit this action is defended, he was not a competent witness for the defendant, and the court did right in excluding his testimony." See also as to privity in such cases the following authorities: *Bigelow on Estoppel* (2d ed.) pp. 66, 69; *Freeman on Judgments*, §§ 164, 173, 174, 179, 184; *Lovejoy v. Murray*, 3 *Wall.* 1; *Jackson v. Griswold*, 4 *Hill*, 522; *Flake v. Smith*, 2 *Abb. Ct. App. Dec.* 77; *Whitney v. Cooper*, 1 *Hill*, 629; *Colward v. Cooper*, 7 *Wend.* 407.

The learned justice remarks that Hillier has not as yet made any claim upon the plaintiff upon his bonds of indemnity. But it is plain that cannot be the test. It is enough that plaintiff is liable to Hillier upon the bond. It has ever been one of the functions of equity to prevent the doing of mischief without waiting until it is done.

Robert S. Green (*Vanderpoel, Green & Cumins*, attorneys), for respondents.

Plaintiff has no standing in court to demand the relief asked. He seeks in the supreme court to annul and set aside a judgment and an order of other courts in a suit in which he was not a party or privy. . . . *Freeman on Judgments*, § 512. "No person will

Wilmore v. Flack.

be permitted to proceed in equity against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights." *Stone v. Towne*, 91 *U. S.* 341 ; *Jordan v. Williams*, 3 *Rand. (Va.)* 501.

If the judgment and order sought to be set aside are void for want of jurisdiction, plaintiff cannot invoke equitable interference, as his remedy at law is complete. The threatened danger to the plaintiff, to avert which he invokes the aid of a court of equity, is that he may be sued on his indemnity bond, which suit will be based on the judgment entered, as he claims without jurisdiction. The authorities bearing on the question as to when jurisdiction can be inquired into, establish: 1. That want of jurisdiction is a matter which may always be set up against a judgment when it is sought to be enforced, or when any benefit is claimed under it. *Latham v. Edgerton*, 9 *Cow.* 227. 2. The jurisdiction of any court exercising authority over a subject may be inquired into in any court where the proceedings of the former are brought by a party claiming the benefit of them: *Pendleton v. Weed*, 17 *N. Y.* 75. See also *Starbuck v. Murray*, 5 *Wend.* 148 ; *Mills v. Martin*, 19 *Johns.* 33 ; *Bloom v. Burdick*, 1 *Hill*, 130 ; *Chenning Bank v. Judson*, 8 *N. Y.* 254 ; *Ferguson v. Crawford*, 70 *Id.* 266 ; *Metcalf v. Williams*, 104 *U. S.* 93.

If the judgment is void for want of jurisdiction and the order also, that fact can always and in any court be shown effectively by the plaintiff if they are sought to be used against him ; his remedy is there complete, and a court of equity will not interfere.

Even if the marine court in entering its judgment, or the court of common pleas, in making its order, erred, no ground of equitable interference by the supreme court is furnished thereby. A court of equity will not grant relief on the ground that the court of

Wilmore v. Flack.

law erred. "An interference on such ground would convert a court of chancery into a court for the correction of errors, and would be an assumption of jurisdiction which does not belong to the court." *Vaughn v. Stockton*, 1 *Stock.* 173; *Simpson v. Hart*, 1 *Johns. Ch.* 95, 99; *Holmes v. Remsen*, 7 *Id.* 286; *Star Ins. Co. v. Hodgson*, 7 *Cranch*, 336-7; *Yancey v. Downer*, 5 *Littell*, 8; S. C., 15 *Amer. Dec.* 35, *and note*; *Story Eq. Juris.* § 897. If the contention of the plaintiff is correct, the marine court had jurisdiction of the parties and of the subject matter, and it never lost that jurisdiction, but rendered an erroneous judgment on an order of a court which never had jurisdiction. This is a judgment erroneously entered, but in the marine court having jurisdiction, and does not come within the rule permitting interference with judgments entered without jurisdiction. The marine court had full power to correct its errors, and a court of equity will not interfere. *Metcalf v. Gilmore*, 29 *Alb. Law J.* 203.

A court of equity will not now relieve where the complaint is in the nature of a bill for a new trial in a court of law. *Anderson v. Roberts*, 18 *Johns.* 533; *Powers v. Butler*, 3 *Green's Ch.* 465. Especially where the party has lost his opportunity at law by his own negligence. *Dodge v. Strong*, 2 *Johns. Ch.* 230, and cases cited—particularly *Smith v. Lowery*, *Johns. Ch.* 320; *Floyd v. Jaques*, 6 *Id.* 479; *Willard's Equity*, 358; *Glover v. Hedges*, *Saxton*, 113; *Fowler v. Roe*, 3 *Stock.* 367.

Courts of equity do not now interfere with judgments of other courts where there has been negligence on the part of the party seeking relief, or because the other court erroneously decided the law. *Smith v. Nelson*, 62 *N. Y.* 288; *Stillwell v. Carpenter*, 59 *Id.* 423.

If plaintiff was in any position as privy to the judgment or order, it would not avail—the defect in the notice of appeal was a mere irregularity under the cir-

 Wilmore v. Flack.

cumstances. Conner might have taken advantage of it—but both parties acted under it—the appellant experimented and lost. The notice of appeal was not a nullity, but amendable *nunc pro tunc*. Hillier v. Conner, 11 *N. Y. Weekly Dig.* 474; Wood v. Kelly, 2 *Hill*, 334; Mott v. Lansing, 5 *Lans.* 516; Irwin v. Muir, 13 *How Pr.* 409.

There is a clear distinction between cases where the defect is the omission of the party to do some act, and cases where there is no jurisdiction in any event, as was the case in McMahon v. Rauhr, 47 *N. Y.* 72; People v. The Clerk, 3 *Abb. Pr.* 320, and Bamberg v. Stern, 76 *N. Y.* 556.

FINCH, J.—The general term of the common pleas had no jurisdiction of the attempted appeal to [1] that tribunal. Its appellate power was derived wholly from the statute and had no existence outside of its permission. An appeal from an order of the general term of the marine court granting a new [2] trial, is allowed only upon condition that the appellant consents to a final judgment against him if the order is affirmed. *Laws of 1874*, chap. 545, § 9; Gordon v. Hartman, 89 *N. Y.* 221. Without that consent there can be no appeal, and much less a final judgment founded upon it and impossible without it. The order and judgment of the common pleas was, [3] therefore, without jurisdiction and void, and judgment entered in the marine court founded upon that void mandate was itself equally so. Nevertheless, both tribunals have held the contrary and insisted against the motion of the plaintiff that their action was valid, and the final judgment rendered, effectual. They have done so apparently upon the ground that the omission from the notice of appeal of the requisite consent was amendable, and that the appellant was estopped by his appearance in the appellate court and

Wilmore v. Flack.

submissions of the appeal to its jurisdiction. That a consent intended to be given, but omitted from the notice of appeal by mistake, and when the appellant in fact consented, might be inserted *nunc pro tunc*, may be conceded for the purposes of the argument ;

but where there has been no mistake because no ['] consent, and the latter was intentionally and consciously omitted, and has never been given, but steadily and persistently refused, we do not see how it is possible to acquire jurisdiction by an amendment which falsifies the facts and originates only in the arbitrary will of the court. The right to give or withhold the consent does not belong to the court but to the party, and his free choice and option cannot be taken away under the guise of correcting a mistake or oversight.

Nor is the plaintiff estopped from raising the question of jurisdiction. His consent to its exercise ['] could not confer it. *McMahon v. Rauher*, 47 N. Y.

67. If it did or could, it is still true that the appellant did not consent to the jurisdiction assumed. He misled nobody. All parties acted in good faith on the appeal, and under a common mistake of the law. The respondent and the court had no right to rely upon the appellant's interpretation of the act of 1874. Each was quite as much bound to know and recognize the lack of jurisdiction as the appellant himself. At the bottom of an estoppel lies either fraud or something which operates as such. Here there was none, but simply an honest mistake for which each party and the court were equally responsible.

The situation of the plaintiff appears to be one in which there exists a definite right without adequate remedy, unless a court of equity can furnish it. The original action of Hillier was wholly for the benefit of the plaintiff. He stood behind it as the party interested, and having indemnified the marshal against its

Wilmore v. Flack.

consequences, Hillier recovered a judgment. The proceeds of it belonged and were payable to the plaintiff; but an appeal was taken to the general term of the marine court, which reversed the judgment and ordered a new trial. All that followed was a nullity, and yet out of that void action the plaintiff finds himself barred of the new trial by a final judgment against him and exposed through his indemnity to liability for a serious bill of costs. He, at first, pursues his remedy at law. He asks the marine court and the common pleas to set aside the judgment which they had no jurisdiction to render. They refuse; then he appeals to the power of a court of equity and is again defeated, substantially upon the ground that he has a perfect remedy at law, and that the final judgment entered in the marine court was within its jurisdiction even though the judgment and remittitur of the common pleas were absolutely void. The argument is that the final judgment entered in the marine court was merely erroneous, and equity will not set it aside for that reason. The ultimate question therefore, is whether such judgment was merely erroneous and so good until reversed, or utterly void as entered without lawful authority and jurisdiction.

In the original action the marine court had jurisdiction, both of the subject matter and of the persons of the litigants, and so might have rendered a final judgment equivalent in its effect to that now upon its records. But it did not do so. It made no such determination of its own. On the contrary, its determination was an award of a new trial. The final judgment entered was that of the common pleas, registered or docketed so to speak, in the marine court, in obedience to a special statutory authority. The act of 1875, which authorized an appeal to the common pleas from an order granting a new trial, required as a condition, the appellant's consent to final judgment, and directed

Wilmore v. Flack.

that "effect shall be given by the appellate court to such stipulation if necessary" (39). The act of 1875 more specifically provided that the appellate court "may render judgment absolute upon the right of the appellant." So that the final judgment here was that

of the appellate court, and if absolutely void for ['] want of jurisdiction, how could it become less defective because submitted to the marine court and entered on its records? Is its essential character changed by that process? If upon the judgment for costs thus entered in the marine court, proceedings to collect were instituted, and the judgment debtor resisted on the ground that the judgment was void, would it be a sufficient answer that the judgment was good until reversed? Suppose that this court on a similar appeal should render a decision without a quorum, and send down its remittitur, and its judgment should be made by formal order the judgment of the supreme court, would the latter be merely erroneous and good until reversed, or absolutely void and a mere nullity? We think in such case the judgment entered on the remittitur gains no new validity beyond that which it had in the appellate court, but remains void if it was so in fact when remitted to be enforced. If a judgment should be rendered in justice's court which was absolutely void for want of jurisdiction, and thereafter, upon transcript filed, was entered in and became the judgment of the county court, it would gain from the process no new validity. The judgment entered in the marine court was a step in an appellate proceeding and must be measured by the statutory requirements. It was not a judgment of the marine court itself, founded upon its original jurisdiction, but the culmination of an appeal dependent wholly for its validity upon the authority of the appellate court. The case, there-

['] fore, is not one, as the general term argue, in which a court of equity is called upon to review a mere

Wilmore v. Flack.

error of law committed by another tribunal, but one in which a void judgment bars the rights of the plaintiff after his remedy at law has been exhausted.

The special term seem to have thought that the legal remedy was not exhausted, and argue that the judgment for costs has not yet put in peril the plaintiff's liability as the marshal's indemnitor, and if it should he might defend on the ground of the invalidity of the judgment. If sued on his bond in the marine court the defense would only renew the question upon which that court and its appellate tribunal have already decided against him. But he has a further right, and that is to the new trial which the marine court awarded him, and that he cannot have unless equity can remove the obstruction of the final judgment against him.

The whole difficulty in the case originated in a mistake as to the jurisdiction of the common pleas over the appeal sought to be taken; a mistake in which both parties shared, and which the court did not correct.

That mistake resulted in a judgment of the common pleas which was entirely void, and did not become ['] valid by being remitted to the marine court and made its judgment. In such a case we think equity may relieve, and that the plaintiff's complaint therefore contained a good cause of action.

The judgment should be reversed and a new trial granted; costs to abide the event.

All concurred.

Gearon v. Bank for Savings.

GEARON, APPELLANT, v. THE BANK FOR SAVINGS, IMPLEADED, RESPONDENT.

N. Y. SUPERIOR COURT, GENERAL TERM, MARCH, 1884.

§ 55.

Attorney and client—arrest.

In the absence of special authority, express or implied, by the client, or of ratification by him, the act of the attorney in directing the sheriff to arrest the wrong personage under a warrant of attachment issued in the action, does not make the client liable.

Guillaume v. Rowe, 48 *Super. Ct.* 170 ; Poucher v. Blanchard, 86 *N. Y.* 263 ; Welsh v. Cochran, 63 *Id.* 182 ; Williams v. Preston, 47 *L. T. Rep. N. S.* 265 ; Smith v. Keal, 46 *L. T. Rep. N. S.* 770, cited and reviewed.

(Decided April 7, 1884.)

Appeal from judgment dismissing the complaint on the merits.

Action for false imprisonment.

The facts are stated in the opinion.

Miles Gearon and *William H. Arnoux*, for appellant.

The act complained of was chargeable to the respondent by reason of the relation existing between its attorneys, and because it was done by the attorneys in the course of their employment. The acts of an attorney's clerk in the course of his employment are the acts of the attorney *Ostrich v. Gilbert*, 9 *Hun*, 242. The rule that a principal is not liable for acts of an attorney done after the issuing of an execution, is inapplicable to a case where the directions are given in the

Gearon v. Bank for Savings.

course of its prosecution. The same distinction has been pointed out in this court in *Guillaume v. Rowe*, 63 *How. Pr.* 175; *S. C.*, 48 *Super. Ct.* 169; 18 *W. D.* 196, and *Barker v. Braham*, 3 *Wilson*, 368.

See also as to defendant's liability, 6 *Hun*, 422; *Bates v. Pilling*; *Barn v. Cress*, 38; *Barker v. Braham*, 2 *W. Bl.* 866; *Brown v. Feeter*, 7 *Wend.* 305; *Griswold v. Sedgwick*, 6 *Cow.* 456; *Miller v. Foley*, 28 *Barb.* 630; *Davies v. Jenkins*, 11 *Mees. & W.* 754; *McMahon v. Green*, 34 *Vt.* 69; *Dunstan v. Paterson*, 2 *Comm. Bench, N. S.* 495.

Strong & Cadwalader, for respondent.

I. No one has a right to interfere with the sheriff to direct him whom to arrest, or to instruct him in the performance of his duty. Any citizen may assist him by opinions, but does not thereby become an original tortfeasor. It is not within the duty or employment of attorneys, much less of Lynn, a *quasi* volunteer, or of Stewart, or of the managing clerk, by verbal advice or direction given to the sheriff to render the plaintiff in an action liable for the result of such advice or instruction. *Averill v. Williams*, 4 *Den.* 295; *Welsh v. Cochran*, 63 *N. Y.* 181; *Guillaume v. Rowe*, 16 *J. & S.* 172; *Clark v. Woodruff*, 83 *N. Y.* 518; *Smith v. Keal*, 9 *L. R. Q. B.* 344.

II. (1.) There is no distinction in this case, because the act was done during and not at the end of a litigation. The ground assumed in the case is, that an authority to arrest or to levy is authority only to levy on proper goods, or to arrest the right party, or to issue a writ of commitment to the sheriff, but never to commit a trespass. (2.) Nor is there a difference between directions to secure property and directions to arrest persons; both are trespasses. In both the principal must be held if at all, for the sheriff's acts, by his direction communicated through his solicitors,

Gearon v. Bank for Savings.

and such directions are held beyond the attorney's authority.

O'GORMAN, J.—The material facts, as they appeared in evidence at the trial, are substantially these: An action was brought in the supreme court of this judicial department, by the Bank for Savings, the present defendant herein, on the ground that different persons had laid claim to a sum of money amounting to \$1,469, which had been deposited in the Bank for Savings in 1827, by one Jacob Kniffer; and in this action these several claimants, and also Michael A. Gearon, the attorney of one of them, named Lancaster, were made defendants. This Lancaster had been appointed administrator of Kniffer's estate, and the money had been paid over to Michael A. Gearon, his attorney, and was in the possession of Gearon. A motion in this action for the appointment of a receiver was made and granted on December 27, 1882, and an order was also made requiring Michael A. Gearon to pay the money into the hands of the receiver within five days. Difficulty was experienced in making service of this order on Michael A. Gearon. At last, service was made on a person then supposed to be Michael A. Gearon, and the money not having been paid into the hands of the receiver, in obedience to this order, a warrant of attachment was issued directing the sheriff to attach the person of said Michael A. Gearon, and to produce him before the court. The sheriff's officer having charge of the execution of this attachment, applied to the attorneys of the Bank for Savings, the plaintiffs in that action, for instructions, and they sent with him one of their clerks to an office in Pine street in this city, where the sheriff's officer, acting under the instructions of this clerk, arrested the plaintiff in the present action, being informed by said clerk that the person so arrested was Michael A. Gearon, and plaintiff was held

Gearon v. Bank for Savings.

in custody by the sheriff all night and until the next morning, when he was discharged, on proof that he was not Michael A. Gearon, the person named in the attachment, but his brother, Miles Gearon, the plaintiff in the present action.

There was no evidence of any special authority, either express or implied, from the Bank for Savings, the plaintiff in that action, to their attorney, or to the sheriff, to arrest Miles Gearon; nor was there any subsequent ratification by the bank, of the act of the sheriff, or of their attorneys, after knowledge of that event.

The trial judge dismissed the plaintiff's complaint in the present action, on the ground that there had been no proof of any authority from the Bank for Savings, the present defendant, to arrest Miles Gearon the present plaintiff; and the question now to be discussed, is whether, in the absence of such proof, the present defendant can be held responsible for the act of their attorneys in instructing the sheriff to arrest the plaintiff Miles Gearon, the order of attachment having directed that officer to arrest Michael A. Gearon.

The case of *Guillaume v. Rowe* (48 *Super. Ct.* 179), although not in all its features resembling the case at bar, yet contains a valuable statement of the rules of law applicable to cases of this kind. The attorneys of the defendants there, in an action brought by them against Guillaume, caused to be issued, without any authority of law, an execution against his person, and under that execution Guillaume was arrested and held in custody. He brought an action for false imprisonment against the persons who had employed the attorneys. The learned trial judge dismissed the complaint on the ground that, conceding the execution against Guillaume to be void for want of jurisdiction, there was no evidence showing that the defendants authorized the issue of the execution, or the arrest of the plaintiff Guillaume.

Gearon v. Bank for Savings.

The court at general term held that the case should have gone to the jury, and ordered a new trial, on the ground that "the evidence established that the attorneys who issued the execution against the person of Guilleaume, had acted as the attorneys of the defendants all through the litigation, before and after judgment, and that that was sufficient to make them *prima facie* the agents of the defendants; for unless restricted, the attorney had plenary power in the prosecution of the suit to judgment and execution, and in these respects his acts bind and conclude his client." The court further says, "that in such a case, the authority may be deduced from the nature of the employment, which is to collect the claim by legal process. . . . As a general rule, a principal is liable for such wrong of his agent as is committed in the course of his employment, as for the benefit of his principal, and this, although no express command or privity be shown."

In that case, this familiar rule of law, that the principal is responsible for the act of his agent acting within the scope of his authority, was properly applied, for the attorneys were employed to bring suit against Guilleaume, and the wrong done him by his unlawful arrest was done in the course of that employment, and was within the attorney's plenary power in the prosecution of that suit. But the court, in its opinion, goes farther, and describes the circumstances, in which the act of the attorney under the plenary power to conduct the suit, would not bind the client. "It is only," says the court, "when, after having issued execution, the attorney undertakes to give special directions for its enforcement in a manner not warranted by the language of the writ, and when the officer may justly decline to take the responsibility, in the absence of indemnity, that the client can be held only on proof of special authority to the agent, express or

Gearon v. Bank for Savings.

implied, or of subsequent ratification, with knowledge of the facts." In these terms, the court describes, as I think, the state of facts in the case at bar, supplies the true test of the responsibility of the client for the act of his attorney, and marks out the limits within which the plenary power of the attorney, under his ordinary retainer, is confined.

In the case at bar, the attorneys were employed by the Bank for Savings to bring suit against Michael A. Gearon. If, in the course of that employment, they arrested Michael A. Gearon, and arrested him wrongfully, that act would have been within the course of their employment, and their clients would have been responsible. *Poucher v. Blanchard*, 86 N. Y. 263. But if they had brought suit, not against Michael A. Gearon, but against Miles Gearon, and caused Miles Gearon to be arrested, these acts would have been outside their employment, which was only to sue Michael A. Gearon, and their clients (the Bank for Savings) would not have been responsible. So also, if in the action properly brought by them against Michael A. Gearon, they had caused a writ to be issued against Miles Gearon by name, and caused him to be unlawfully arrested, that act would have been outside the course of their employment, and their clients would not have been responsible, because their clients had never employed them to molest Miles Gearon in any way.

In the case at bar, they caused an attachment issued by the court to take the person of Michael A. Gearon to be unlawfully executed by taking the person of Miles Gearon. That was, in my opinion, an act also outside the limits of their employment, and for which their clients were not responsible.

Indeed, on the issue of the attachment and its delivery to the sheriff for execution, the employment of the attorneys, as to that attachment, ceased. They

Gearon v. Bank for Savings.

had done all their duty in that matter. It was no part of their duty to instruct the sheriff how the attachment should be executed. That was the sheriff's duty, not theirs. With the writ of the court in his hands, directing him to arrest Michael A. Gearon, he was bound, in the course of his employment as sheriff, to look to it that he arrested Michael A. Gearon, and no one else, under that writ. He was under no obligation to obey the orders of the attorneys for the plaintiff in that action as to that writ, but only the orders of the court; and if he arrested a wrong man, he was responsible, and the fact that the attorneys for the plaintiff in that action had told him to arrest a man other than Michael A. Gearon, would be no justification.

In my opinion, the case is one precisely similar to that described in the latter part of the opinion of this court in *Guillaume v. Rowe* (*supra*). Here, the attorneys of the Savings Bank, after having issued the writ, undertook to give special directions to the sheriff for its enforcement, in a manner not warranted by the language of the writ, and to enforce it in such a manner that the sheriff would have been justified in declining to take the responsibility in the absence of indemnity; and here, as in the case supposed in the opinion in *Guillaume v. Rowe*, the client (the Savings Bank), could be held only upon proof of *special authority* to their attorneys, express or implied, or of subsequent ratification. There is, in the case at bar, no evidence whatever of such special authority or ratification.

An analogy exists between cases of unlawful seizures of goods under process, and unlawful arrests of the person. In *Welsh v. Cochran* (63 N. Y. 182), the plaintiff sued for an alleged unlawful seizure and conversion of his property. It was seized under a warrant issued in bankruptcy proceedings, and directing

Gearon v. Bank for Savings.

the taking of goods belonging to persons other than the plaintiff. The defendants were the petitioning creditors, and the warrant was issued at their instance, and the marshal acted under the instructions of their attorneys in making the seizure. The trial judge directed a verdict for the plaintiff. The court of appeals reversed the judgment, and ordered a new trial. I find in the opinion of that court the following expressions, which apply to the case at bar: "The warrant issued at the instance of the defendants only authorized the seizure of the goods of the bankrupt named therein, and not goods in possession of the plaintiff. The defendants were not present at the taking, and did not in person, direct or interfere with the persons committing the trespass on the plaintiff. They may have put the officers in motion, but the authority from defendants which the law would imply, was only co-extensive with that conferred by the warrant, and to do only lawful acts pursuant to the warrant. The law will not presume an authority from the defendants to do an unlawful act. . . . The presence of the attorney for the defendants at the seizure of the goods, and his directions to the officers, did not make the defendants liable for the tortious act. In the absence of proof of *special authority* to an attorney, his acts in directing the levy on, or the taking of goods on process, are in excess of his general powers as an attorney, and do not subject his client to liability."

Recent English decisions exhibit a similar tendency to the restriction of the implied authority of the attorney to impose liability on the client. The client is not held liable for a fraudulent defense put in by his attorney. *Williams v. Preston*, 47 *L. T. Rep. N. S.* 265. The client is not liable for the act of his attorney in directing the sheriff on what goods to levy. *Smith v. Keal*, 46 *L. T. Rep. N. S.* 770.

Gearon v. Bank for Savings.

The cases cited by the learned counsel for the plaintiff, in his brief, do not, in my opinion, give any real or effectual support to the plaintiff's claim in this action, and in none of them are the facts similar to those in the case at bar.

Here the action of the attorneys of the Bank for Savings, in directing the sheriff to arrest Miles Gearon, the plaintiff in this action, was outside the scope of their employment, and outside of the general authority presumed to have been conferred on them by the defendants. Their directing the arrest of a man, other than the man named in the order of attachment, was wholly unlawful, and defendants cannot be presumed to have authorized an unlawful act. The presumed lawful authority of the attorneys of the Bank for Savings, as to the order of attachment, was at an end the moment it was delivered to the sheriff for execution. The sheriff's authority and his functions then began. They had no right to direct him in the execution of the writ, and he was not under their control as to the manner of executing it. In the execution of his official duty, he acted at his peril; and their direction that he should arrest the wrong man would be neither justification nor protection to him.

The facts, as they appeared in the evidence in this case, were clear, and no difference of opinion depending on different deductions or inferences could arise, requiring the decision of the jury.

The burden of proving special instructions from the Bank of Savings, the defendants here, to their attorneys, or to the sheriff, to arrest the plaintiff, was on the plaintiff, and no such proof was given. The dismissal of the complaint was, therefore, proper.

The judgment appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

Syracuse Savings Bank v. Burton.

SYRACUSE SAVINGS BANK v. BURTON, ET AL.

SUPREME COURT, UTICA COUNTY SPECIAL TERM,
JULY, 1884.

§§ 438, 439.

Infant.—Service of summons on, by publication.—Estoppel.

Section 438 of the Code of Civil Procedure, which provides for the service of the summons in an action upon a non-resident, or where the residence of the defendant is unknown to the plaintiff, is equally applicable to an infant as to an adult.^[1]

For the purpose of determining the place of residence of an infant under the provisions of the Code of Civil Procedure, allowing service of the summons in an action by publication, that of the mother having the care, custody and control of the child must be regarded as that of the child.^[2]

The summons in an action must be served upon an infant defendant in one of the modes provided by statute, in order to confer upon the court jurisdiction of the person, and give it authority to appoint a guardian *ad litem* to enable the defendant to appear and defend the action.^[4] When the service has been in fact made, in a manner provided by statute, and the infant has appeared and answered, by which material issues have been made, and they have been tried and determined by a court of competent jurisdiction, it is too late to challenge the truth of the affidavit conferring jurisdiction upon the court or of the infant's own sworn statement affirming the truth of such affidavit.^[5]

Where an order for the service of the summons in an action upon infant defendant by publication was made upon a complaint showing a good cause of action against such defendants, and an affidavit alleging that the infants resided "with their mother in New Bedford in the state of Massachusetts," and were then there: *Held*, that purchasers of property sold under a judgment recovered therein should not be excused from taking title, on the ground that one of the infants so served who had appeared, had a guardian *ad litem* appointed and defended the action, was at the time of the service temporarily within the state.^[2]

(Decided August 2, 1884.)

Syracuse Savings Bank v. Burton.

Motion by the plaintiff for an order directing Thomas Lane to complete the purchase made by him of certain lands bid off by him on a sale thereof upon a judgment of foreclosure, entered herein, to accept a deed, pay purchase money, &c.

It appears that a mortgage was duly executed and delivered by Henry B. Burton and Cornelia H., his wife, to the plaintiff bearing date on January 11, 1871, given to secure the payment of a certain sum of money as therein provided.

Default having been made in the payment, this action was commenced to foreclose the mortgage. The following among others were made defendants therein: Henry B. Burton, Cornelia H. Burton, his wife, Cornelia H. Burton, as trustee of Anna G. Burton, Grace Burton and Burr Burton; Anna G. Burton, Grace Burton and Burr. Burton. The action culminated in a judgment of foreclosure and a sale of the mortgage premises by virtue thereof by the sheriff of Onondaga county. Upon the sale Thomas Lane became the purchaser for the sum of \$3,960, that being the highest sum bid and he being the highest bidder. Lane refuses to complete the sale and pay the amount bid by him. The principal ground for such refusal being that the defendant, Anna G. Burton, at the time of the commencement of this action, an infant of more than fourteen years of age, was not properly served with the summons herein, and that the courts acquired no jurisdiction of her person and therefore the judgment is not conclusive against her, and because thereof the title is defective. The plaintiff claimed that Anna G. Burton, was at the time of the commencement of this action a resident of New Bedford in the state of Massachusetts and that personal service of the summons could not be made upon her, and upon the presentation of an affidavit setting forth facts hereinafter stated, together

Syracuse Savings Bank v. Burton.

with the verified complaint to a justice of this court, an order was made for the service of the summons upon said Anna G. Burton, by publication. Such service was made before the time for answering expired, on her petition duly verified, she being sixteen years of age, in which she states her place of residence to be with her mother, Cornelia H. Burton, at New Bedford in the state of Massachusetts. A guardian *ad litem* was duly appointed for her in the action, and answer interposed by him presenting the material issues for trial the same were tried by this court, judgment ordered for plaintiff and subsequently entered.

Charles G. Baldwin and *Lewis Marshall*, for the motion.

J. Page Munroe, for the purchaser, opposed.

KENNEDY, J.—The Code of Civil Procedure, section 438, provides that an order directing the service of a summons upon a defendant without the state or by publication may be made in either of the following cases.

First. When the defendant, being a natural person, is not a resident of the state, or when after diligent inquiry the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state. The remaining subdivisions of said section are unimportant as bearing upon the question, except as reference is hereinafter made to subdivision 5. The provisions above quoted is equally applicable to an infant as an adult defendant. *Wheeler case*, 50 N. Y. 667. The judgment-roll herein shows that on April 10, 1883, a verified complaint showing the existence of a sufficient cause of action against the said infant, together with an affidavit containing the following alle-

Syracuse Savings Bank v. Burton.

gation of the affiant, that is to say, "That the defendants Anna G. Burton, Grace Burton and Burr Burton, are infants and children of Henry B. Burton and Cornelia H. Burton, and reside with their mother in New Bedford in the state of Massachusetts and are now there, and that the plaintiff will be unable to make personal service upon them," was presented to a justice of this court and an order that the summons be served by publication on said Anna G. Burton asked for, which was granted, and the service of the summons thereafter made as required by said order and as in like cases provided by statute. The papers thus presented (§ 439 Code) and acted upon confer jurisdiction upon the officer to make the order and it could not be avoided except by being vacated or set aside in proceedings instituted for that purpose. After the summons by publication had been commenced and before the time for appearance and answer had expired the said Anna G. Burton presented her petition, she being then 16 years of age, to a proper officer asking for the appointment of a guardian *ad litem* for her in the action, in which petition verified by her, she stated her residence to be New Bedford in the state of Massachusetts, and that "the service of the summons herein was being made upon her by publication," and such guardian was appointed. By the appointment of guardian *ad litem* for her, the answer interposed in her behalf, the trial of the issues made thereby, and the judgment of the court made thereon, the said infant has had her day in court and unless imperatively demanded she should not at any future time be permitted to question the verity of the record, nor should the integrity of the same be subject to impeachment by her. It is not questioned but that Anna G. Burton was, at the time the service was made, in the care and custody of her mother and that her mother was a non-resident of the state. The most that can be

Syracuse Savings Bank v. Burton.

urged by the purchaser is that the said Anna was at that time temporarily staying in the city of New York and was away from her mother. This is assumed as true, although the statement in the affidavit real ['] in opposition to the motion, is alone upon information and belief, and does not prove the alleged facts. Conceding the fact, however, as claimed, it does not in any manner impeach the regularity of the service as made. For the purpose of determining the infant's place of residence under the provisions of ['] this statute, I am clearly of the opinion that that of her mother having the care, custody and control of her infant child, must be regarded as that of the child. If I am right in this, then the verity of the judgment-roll cannot be impeached either collaterally or by direct proceedings for that purpose. *Belmont v. Cornen*, 82 N. Y. 256.

The summons must be served on infant defendants, in one of the modes provided by the statute ['] in order to confer upon the court jurisdiction of the person and give it authority to appoint a guardian *ad litem* to enable the defendant to appear and defend the action. *Ingersoll v. Mangam*, 84 N. Y. 623.

When the service has been in fact made in a manner provided by statute and the infant has appeared and answered, by which material issues have been made, and they have been tried and determined by a court of competent jurisdiction, it is too late to challenge or void the proceedings afterwards, by an attempt to falsify the truth of the affidavit conferring jurisdiction upon the court, or of her own sworn statement affirming the truth of said affidavit. The petition of the infant for the appointment of the guardian *ad litem* forms a part of the judgment roll. It is referred to by her, and in it she states, that she is a resident of New Bedford, in the state of Massa-

Syracuse Savings Bank v. Burton.

chusetts, "and that the summons is being served upon her by publication."

Under the evidence in this case the judgment must be regarded as conclusive. The claim therefore of the purchaser is not available to him to relieve him from his contract, as the title he acquires cannot be impeached upon the ground urged by him. It is not important on this motion to inquire what are the exact interests of Cornelia H. Burton under the deed from Emily Howland. It is sufficient to say that under that conveyance the defendant Anna G. Burton, had such an interest in the mortgaged premises as made her one necessary party defendant, within the provisions of the 5th. subdivision of section 438 of the Code above cited, and that the court had jurisdiction of the subject matter thereof. Whatever interests Henry B. Burton had in the premises as guardian in socage for the said Anna G., was cut off by the sale upon the judgment. The allegations in the affidavit of the purchaser as to certain conversations had by him between the individuals who were officers of the plaintiff upon the subject of the plaintiff's lending such purchaser \$3,000 are not sufficient to exclude him from the performance of his contract. It follows that an order should be entered requiring the purchaser Thomas Lane to complete the purchase made by him on the sale of the premises upon said judgment of foreclosure by paying to the sheriff of Onondaga county who made such sale, the sum bid by him, that is \$3,060, in the manner required by the terms of said sale upon receiving a deed in the usual form, and executed by said sheriff to him for said premises. And in case of the inability of said Thomas Lane to complete said purchase by him then the sheriff shall resell said premises upon said judgment that he pay the costs and expenses of such re-sale as well also the difference between the price said premises shall sell for on such

Boyd v. N. Y. Central, &c. R. R. Co.

re-sale, provided said price shall be less than the said sum of \$3,960 and interest thereon and the amount bid by him. Ten dollars costs of motion together with disbursements to be paid by said purchaser Thomas Line, to the plaintiff. Unless the form of the order is agreed upon by the respective attorneys, the same may be settled before me at my chambers on one day's notice.

BOYD, AS ADMINISTRATOR, ETC., OF BOYD, DECEASED, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

SUPREME COURT, RENSSELAER CIRCUIT, SEPTEMBER, 1884.

§§ 1904, 3253.

Extra allowance.—Basis of, in action for causing death.

An extra allowance in an action to recover damages for causing death, should be computed upon the sum awarded by the jury and the interest thereon, from the date of the death of the deceased, which the Code requires the clerk to add thereto.

The expression "the sum recovered," in section 3253 of the Code of Civil Procedure, which provides for the granting of additional allowances, includes and covers all damages awarded to a party and recovered by him in an action, whether compelled by a jury, a court or a referee, or given solely by statute or partly dependent on both.

(Decided September, 1884.)

Motion by plaintiff for an additional allowance on his recovery herein.

Sufficient facts appear in the opinion.

Boyd v. N. Y. Central, &c. R. R. Co.

R. A. Parmenter, and *F. J. Parmenter*, for the motion.

E. L. Fursman, opposed.

WESTBROOK, J.—The plaintiff after a severe contest at the present circuit recovered a verdict of two thousand dollars in the above entitled cause.

The action was brought under section 1902 of "The Code of Civil Procedure" to recover compensation for the death of a son.

The plaintiff moved for an extra allowance under section 3253, and asked that it be computed upon the sum awarded by the jury with the interest thereon added from the date of the decedent's death (January 19, 1877), which interest the clerk is required by section 1904 to "add to the sum awarded" by the jury, "and include it in the judgment."

The defendant conceded the case to be "a difficult and extraordinary" one and that an allowance was proper, but insisted that it should be computed upon the amount of the verdict only.

The question which this motion presents therefore is, upon what shall the allowance be computed, upon the amount of the verdict only, or upon such amount with interest added from the date of the death?

The language of the section (3256) giving the allowance, and which is applicable to this case, requires it to be computed "*upon the sum recovered.*" The claim of the plaintiff was that "the sum *recovered*" is the amount of the damages which he recovers by the action; while the claim of the defendant is that the expression only refers to the amount awarded by the verdict.

The point involved has not been directly decided to my knowledge, and must therefore be treated as an original question.

Boyd v. N. Y. Central, &c. R. R. Co.

In an action of this character when the plaintiff recovers, the jury, the court, or the referee to whom the question is submitted, may award "such a sum not exceeding five thousand dollars" as they or he deem or "deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought." The same section of the Code (1904), from which the quotation has just been made, further provides: "When final judgment for the plaintiff is rendered, the clerk *must* add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment. The inquiry, verdict, report, or decision may specify the day from which the interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits."

From the section of the Code just referred to it seems reasonably clear that "the sum *recovered*" in this action is not only the amount of the verdict, which represented the judgment of the jury as to what would be "a fair and just compensation for the pecuniary injuries" to the plaintiff "resulting from the decedent's death," but also the interest upon such amount from the date of the death. That such interest is required by express statutory enactment to be added does not make such addition anything other or different than a part of "the sum recovered." If the Code had authorized the jury to make the interest a part of the verdict, and that in fact had been done, the point that the allowance should be confined to the jury's estimate of the "pecuniary injuries" resulting from the death would not probably have been made. That the Code has by plain words made the interest a part of "the sum recovered" and has not left its allowance or non-allowance to the discretion of the jury, cannot alter or change the words of section 3253. That sec-

Boyd v. N. Y. Central, &c. R. R. Co.

tion does not provide that the allowance shall be based upon the amount of a verdict, a decision of a court, or the report of a referee, but "upon the sum recovered." In other words, the allowance shall be made upon the damages which are awarded to the party by the action. These damages may be such only as a jury, a court or a referee may compute, or may be given solely by statute, or may depend, as in this case, partly on both ; but whether given in either of the ways mentioned, so long as they represent "*the* sum recovered," that sum, and no other, is the one upon which the allowance is to be computed.

The order in this case will be that the allowance granted shall be computed upon the verdict with the interest added from the date of the decedent's death. The allowance in this case will be at the rate of five per cent., because that rate in this particular case is not too much. If the basis of the allowance will yield in some future case too large a sum, the rate is in the discretion of the court. The only point now decided is that the expression, "the sum recovered," used in section 3253 of the Code includes and covers all the damages awarded to a party, and recovered by him in an action.

Goodwin v. Bunzl.

GOODWIN, ET AL., RESPONDENTS, v. BUNZL, ET AL.,
APPELLANTS.

N. Y. SUPERIOR COURT, GENERAL TERM, MAY, 1884.

§§ 1328, 1329, 1335.

Replevin.—Undertaking on appeal.—When sureties will be held liable on.

Where both parties request the direction of a verdict, there is no question of fact to be reviewed by the appellate court.

Though an undertaking on appeal be defective in form, and not sufficient to give a stay of proceedings, yet as against the sureties it may be supported by any sufficient consideration. The burden of proving this is upon the party seeking to charge the sureties, but it may be shown by circumstantial evidence.

Where a defective undertaking is made for the purpose of obtaining a stay, and respondent at appellant's request withdraws his exception thereto, and the undertaking is approved on consent, and used to obtain a stay, and respondent relying solely on it does not issue execution, the sureties will be held liable thereon, especially when it does not appear that they knew of or took action on the exception to the undertaking.

In this case, where the judgment in replevin against three defendants, was affirmed as to two defendants, it was *held*, that there was a breach of the condition of the undertaking.

(Decided June 20, 1884.)

Appeal by defendants from judgment in favor of plaintiffs.

Action against defendants as sureties on an undertaking on appeal in an action of replevin.

The facts appear in the opinion.

M. A. Rogensberger and *Everitt P. Wheeler*, for appellants.

By sections 1328 and 1329 of the Code of Civil

Goodwin v. Bunzl.

Procedure, an appeal from a judgment for the recovery of a chattel is not stayed until the appellant gives a written undertaking in a sum fixed by the court below, that the appellants will obey the direction of the appellate court upon the appeal. No directions were made by the appellate court, which the appellants refused to obey. And if it were otherwise, these sureties did not make such an engagement.

By the provision of section 1335 of the Code of Civil Procedure, the sureties when excepted to, must justify on oath in court, and the appellants' attorney must serve notice of the allowance of the undertaking on the exceptants, and the failure to justify, has the same effect as though no undertaking had been given

Kelly & McRae, for respondents.

The sureties chose and executed the undertaking in the form it is, intending it as a good and sufficient undertaking for the purpose of staying execution; that it was considered and treated by all parties as fulfilling that purpose, and that they are estopped from denying its force or obligation. *Harrison v. Wilkin*, 62 *N. Y.* 412; *Hill v. Burke*, 62 *Id.* 111; *Wheaton v. Fay*, 62 *Id.* 275; *Coleman v. Bean*, 3 *Keyes*, 94; *Decker v. Judson*, 16 *N. Y.* 439.

There is no force in the contention that because the sureties did not formally justify in court, that they are not liable on their undertaking. This was waived by plaintiffs' counsel at the express request of defendant's counsel, and, therefore, the sureties cannot take advantage of it. *Ballard v. Ballard*, 18 *N. Y.* 491.

SEDGWICK, Ch. J.—The decision of this appeal must rest solely upon the determination of questions of law that are pertinent to exceptions taken upon the trial. There was no request to go to the jury upon an issue of fact. Both sides asked for a direction of a verdict.

Goodwin v. Bunzl.

Although the defendants excepted to the direction that was made in favor of the plaintiff, that exception was not upon the ground that there was a question of fact for the jury, because the defendants contemporaneously demanded a direction in their own favor, which implied that there was no dispute of fact.

What has been said is to be applied to the main point taken by the defendants as to whether the undertaking by the sureties was supported by any legal consideration. They argued that the undertaking was not in the form prescribed by the statute as the one which, when executed by sufficient sureties, gives to the appellant in the action in which the undertaking may be given, a right to a stay of proceedings upon the judgment. It may be assumed that this proposition is correct. The undertaking, however, may be supported, as any contract may be, by a sufficient consideration, which, when the undertaking is not in due form, it is necessary that the plaintiff in an action upon it must affirmatively prove. Accordingly, the defendants in this action, upon the trial took the position that the plaintiff had not proved any consideration for the undertaking. In such a case the consideration may, as in any other case, be an inconvenience suffered, or a forbearance of a right to enforce a legal remedy, by a promisee at the request of the promisor. There is no rule of law that requires this to be proved by direct testimony. It may be shown by circumstantial testimony. A stay of proceedings upon a judgment on request is a sufficient consideration. *Post v. Doremus*, 60 N. Y. 373.

In the present case the sureties knew the law on the subject of the stay of proceedings upon judgments after appeal, or were presumed to know it. The only purpose for which they could have made and offered it, was to secure to their principal the benefit of a stay. The want of form to comply with the statute was, it is

Goodwin v. Bunzl.

to be presumed, within their knowledge. The respondents, having the power to object to the undertaking and to secure its disapproval, consented that it might be approved as it was ; and their attorney as a witness on the present trial, testified that he did not issue any execution, relying on the undertaking. All these facts and the necessary implications in them, tend to show a stay at the request of the defendants. And if they do not incontrovertibly show this, they would prevent a direction for the defendant, and would give the defendants the right to go to the jury as to the fact. This right, however, was not, as has been observed, claimed. There was a general objection to the direction for the plaintiff, without calling the attention of the court to this particular fact, in any other way than in arguing that there was no evidence of a consideration.

In *Post v. Doremus (supra)*, the court showed that the plaintiff in that case did not accept the undertaking as sufficient to secure a stay of proceedings, but only sufficient to perfect an appeal. In the present case, the facts would justify a finding of fact that the plaintiff did stay the appeal in consequence of the undertaking. I do not see how the defendants can claim that the defect in form of the undertaking should signify that they did not impliedly request a stay of proceedings. There was no other object of an undertaking than a stay of proceedings.

I am of the opinion that the ground stated by the judge below of his direction, was valid. The undertaking was used as the defendants (it is to be inferred) intended it was to be used, in being presented to the judge who approved it, for his determination as to whether it was in proper form and with sufficient sureties to give the appellants in that case a right to a stay. The approval was a judicial determination by him on the subject, and all the parties to it should be bound

Goodwin v. Bunzl.

by it, until it be set aside. The fact that the sureties made the undertaking and delivered it, is sufficient evidence that the approval was by their consent, or rather at their instance.

Manning v. Gould (90 N. Y. 476), it is argued, is an authority that these defendants are not bound by the undertaking, because they were excepted to and did not thereafter justify. To make the cited case an authority on the subject, it is said that the sureties failed to justify. The facts do not show that there was any failure on the part of the defendants to justify. They did not justify, nor was it shown that they knew there had been an exception to them. On the contrary, at the request of the attorney for the appellant in the former action, the attorney for the respondents withdrew his exception and consented to the approval of the undertaking. The first sentence of Judge TRACY's opinion in Manning v. Gould (*supra*), shows that it implies that in a case like the present the sureties are liable. Judge TRACY said, "The question is whether the sureties on an undertaking given on appeal, when excepted to and they fail or refuse to justify, and justification is not waived by the respondent, are nevertheless bound by the conditions of their undertaking." If both parties stand upon the exception and there is a failure to justify, then in the language of the Code the effect is the same as if no undertaking had been given. But in case an exception is withdrawn and the undertaking is approved by consent, the case stands as if there had been no exception, especially when the sureties were not apprised of the exception and did not in any way act upon it.

There was another objection: that the condition of the undertaking was not broken. The condition was, "that if the said judgment so appealed from or any part thereof be affirmed or the appeal be dismissed, the said appellants will pay the sum recovered or di-

Goodwin v. Bunzl.

rected to be paid by the said judgment." The judgment was that "the plaintiff recover from the defendants, the possession of said property, together with said \$49 damages and said costs, or if possession of said property is not delivered to plaintiff, then that they recover the said value, together with said damages and costs, making in all the sum of \$1,675.87, &c."

The action in which the judgment was obtained was in replevin against three defendants. Two of them were parties who had assigned and transferred the chattels to the third, and the chattels were, at the time of the action, in the possession of the third, and remained there until he transferred them to other persons. The judgment was affirmed as to the assignor, and reversed as to the assignee. A new trial was had, and judgment rendered in his favor. The judgment was really joint and several against the three, and when there was an affirmance as to the assignors the sureties became liable upon the undertaking. *Seacord v. Morgan*, 3 *Keyes*, 633. It does not follow that because, in fact, the possession of the chattels was in the third defendant, that the obligation of the two, under the judgment to restore them to the plaintiffs, was affected. Replevin will lie although the defendant has parted with the possession of the property and the same is beyond the reach of the process of the court, so that in no event can a return of the property be had, either in virtue of the claim and demand of the plaintiff or any judgment that may be given in the action. *Barrett v. Selling*, 70 *N. Y.* 492, citing *Nichols v. Michael*, 23 *Id.* 264. It is not a question here, how in such a case, there can be judgment against the two while it is in favor of the third. Such is the judgment, which binds all parties, and that is a final consideration, while it may be imagined, how the result was competently reached.

Certainly it appears that the judgment did not

Seligman v. Wallach.

require the defendants unconditionally to pay the amount named, but only if possession of the property was not delivered to the plaintiff. In the present case, it was proved affirmatively and conclusively that the possession had not been delivered, so that the obligation to pay the amount had become absolute.

Seeing no reason for disturbing the judgment appealed from, I am of opinion it should be affirmed, with costs.

TRUAX, J., concurred.

SELIGMAN ET AL. v. WALLACH, ET AL.

N. Y. SUPERIOR COURT, SPECIAL TERM, OCTOBER,
1884.

§§ 2435, 2436.

Supplementary proceedings.—Assignment for benefit of creditors.

An examination in supplementary proceedings of a debtor, who has made an assignment for the benefit of creditors, should not be confined to property acquired since the assignment. It may include an inquiry concerning his property, whether legal or equitable, including property transferred to another with the apparent intent to hinder, delay or defraud creditors.

(Decided October 23, 1884.)

Special proceeding for examination of judgment debtor.

The facts appear in the opinion.

Seligman & Seligman, for plaintiffs.

Richard S. Newcombe, for defendants.

Seligman v. Wallach.

O'GORMAN, J.—Defendants being examined in supplementary proceedings under section 2435 of the Code, claim that the examination should be restricted to questions relating to property acquired since the general assignment for the benefit of creditors. In this assignment the wife of one of the defendants and the daughter of the other defendant are preferred to amounts reaching in the aggregate \$82,000, constituting the bulk of the assets of the defendants. I do not think that such a restriction would be proper. The sections of the Code authorizing the examination of a judgment debtor provides that he may be required to attend and be examined "concerning his property" (§§ 2435, 2436). The attitude of the parties in such cases is this: The creditor has exhausted the ordinary remedies and means to collect his debt—by judgment and execution—neither the sheriff nor he can discover any property subject to levy without examination of the debtor himself. The law gives the creditor the right to examine the debtor "concerning his property," meaning thereby such property as could not be discovered, and which has been overlooked or hidden or put beyond the reach of creditors. It is an inquisitorial proceeding and was meant to be so.

An assignment for the benefit of creditors, so called, is too frequently an expedient of dishonest debtors and in order to hinder, delay and defraud creditors, and when made with that intention, the title to the property does not vest in the assignee, but is still, in equity, the property of the debtor and subject to levy under execution. The claim that the mere fact of the debtor's having made a general assignment of his property, stops all further inquiry on the part of the creditor in these proceedings, seems to me untenable and inconsistent with the manifest purpose of these proceedings. Such seems to be the opinion of the court of appeals in *Lathrop v. Clapp* (40 N. Y. 33). In *Me-*

Seligman v. Wallach.

chanics' and Traders' Bank v. Healy (14 *N. Y. Weekly Digest*, 120), the creditor was allowed to show by examination of the debtor in supplementary proceedings that a purchase of the debtor's property was not made in good faith. Property of the judgment debtor, which had become vested in the assignee under a valid agreement, cannot, of course, be reached by these proceedings. It had ceased to be the property of the debtor. But if the assignment bears on its face, or in the circumstances of its execution, any of the ordinary and manifest indications of fraud, then by examination of the judgment debtor it can be shown that the assignment is not valid. The question whether or not the assigned property is not still the property of the debtor is in doubt, and the examination may be directed to that inquiry.

The provisions of section 2460 of the Code, which protect the judgment debtor against the use of his evidence of his own complicity with any fraudulent transfer of his property in criminal proceedings against him, seemed further to sustain the opinion I have above expressed, and I hold, for the purposes of this motion, that the examination of the defendants in this case must not be restricted to property acquired by them since the assignment, but may cover an inquiry "concerning their property" whether equitable or legal, including their property transferred to another with the apparent intent to hinder, delay or defraud their creditors. The scope, and extent, and nature, and mode of that examination must be subject to the control and direction of the judge or referee before whom the examination is taken.

Taylor v. Meldrum.

TAYLOR, RESPONDENT, v. MELDRUM, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL
TERM, OCTOBER, 1883.

§ 829.

Evidence.—Testimony as to personal transaction between a party and a deceased person through whom both parties claim.

Where the principal question in controversy in an action was whether a certain transfer of personal property from one D., deceased at the time of the trial of the action, to plaintiff, was fraudulent and void, to which the defendant claimed title by virtue of a sale under an execution against D.,—*Held*, that evidence by plaintiff as to personal transaction between himself and the deceased was inadmissible; that the fact that such testimony merely reiterated evidence previously given by the witness did not overcome the objection, when such evidence was drawn out either by the plaintiff's counsel in the face of objections interposed by the defendant, or on cross-examination as to matters stated by the witness on his direct examination, or it did not appear until cross-examination that it related to personal transactions with the deceased.

(Decided January, 1884.)

Appeal from a judgment entered in Onondaga county, April 25, 1883, on the report of a referee.

In March, 1876, the plaintiff, then and now a commercial traveler for a tobacco house, bought at sheriff's sale the stock of liquors of one Downing, a liquor dealer. Downing was thereupon made the agent of Taylor for the sale of those goods and other goods bought by Taylor. Downing acted as such agent down to July 28, 1878. In May, 1878, Downing moved Taylor's and his own goods into his, Downing's, barn, and while they were there they were levied upon and sold under an execution issued against Downing, and defendant became the purchaser of them.

Taylor v. Meldrum.

The opinion states further facts.

Sedgwick, Ames & King, for appellant.

The conversation about the sale between Taylor and Downing was inadmissible under section 829 of the Code. Section 829 of the Code is a limitation placed upon the admission of any and all evidence under certain conditions, and while the evidence allowed to be given in regard to the sale was unquestionably *res gestæ*, yet it was evidence relating to a transaction between Taylor and Downing, since deceased, through whom both the parties to this suit derive their title, and clearly within section 829. The plaintiff was allowed, under proper objection, to testify as to a conversation between the deceased and the deputy relating to a transaction between himself and the deceased, and in which he participated. This was clearly an error. *Kraushaar v. Meyer*, 72 N. Y. 602. The evidence was incompetent and immaterial for any purpose. It was the mere declaration of the vendor after the alleged sale and after the levy had been made. *Paige v. Cagwin*, 7 Hill, 361; *Cyler v. McCarthy*, 40 N. Y. 221.

Waters, McLennan & Dillaye, for respondent.

SMITH, P. J.—The principal question in controversy was whether a certain transfer of personal property from one Downing to the plaintiff, in July, 1878, was made with intent to hinder, delay or defraud Downing's creditors. Downing died after the commencement of the suit and before the trial. The plaintiff claimed title to the property through said transfer and the defendant claimed it by virtue of a levy under an execution issued upon a judgment against Downing.

At the trial the plaintiff was examined as a witness in his own behalf. His counsel asked him to state

Taylor v. Meldrum.

what occurred between him and Downing on the 27th and 28th of July (the time of the alleged transfer) in relation to the goods. The defendant's counsel objected to the question as incompetent and inadmissible under section 829 of the Code. The objection was overruled, the defendant's counsel excepted and the witness answered, "On the 28th I went down there, he got the key and went in and showed me these goods. Downing said he turned the goods over to me in satisfaction of a part of what he owed me. We stayed there a few minutes and he wanted me to take the key. I said, I don't want to carry it. He said he would take it over and leave it with Mrs. Downing."

The testimony was directly within the prohibition of section 829. Both parties to the suit claimed to derive title to the property in dispute through the deceased, and the testimony was given by the witness in his own behalf and it related to a personal transaction between the deceased and himself.

The respondent's counsel suggests that the evidence in answer to the question merely reiterated the evidence given on defendant's examination of the witness. To some extent that is true, but in so far as the answer relates to the consideration for the transfer it is new matter.

Besides, the testimony previously given by the witness in relation to the transfer was, for the most part, either drawn out by the plaintiff's counsel in the face of objections interposed by the defendant, or on cross-examination as to matters stated by the witness on his direct examination. Thus the witness was allowed to testify on his direct examination that on July 28, he was the owner of the property and then took possession of it without stating from whom or how he acquired title, and the fact that he derived title from Downing did not appear till he was cross-examined. Had that fact appeared on the direct examination it

Viadero v. Morton.

would have furnished good ground for a motion to strike out the entire testimony of the witness as to his ownership of the property on the ground that it was incompetent under section 829 of the Code. And the fact having appeared on the cross-examination, the re-examination on the same subject was properly objected to

The defendant availed himself of the objection to that class of evidence at the first opportunity. When the witness was asked on his direct examination who owned the property on July 28, the defendant's counsel asked the privilege of showing by the witness who owned the property on July 27 and previous thereto, and that being denied him, he objected to the form of the question and on the plaintiff's being asked when he took possession of the property, the defendant objected, on the ground that a mere conclusion was called for and not the facts, but the referee in his discretion overruled the defendant on both points.

The judgment should be reversed and a new trial ordered before another referee, costs to abide events.

HARDIN and BARKER, JJ., concurred.

VIADERO v. MORTON AND ANOTHER.

CITY COURT OF NEW YORK, SPECIAL TERM, NOVEMBER, 1884.

§§ 449, 454.

Parties to action.—When all the obligors in bond not necessary.—*Auctioneer's bond.*—*Liability of sureties.*—*Suit on, by whom brought.*

An action may be maintained by one who has lost his property by the dishonest and fraudulent acts of an auctioneer on a bond given

Viadero v. Morton.

by the auctioneer to the Mayor, &c. of the city of New York, which the statute (*Laws of 1853*, chap. 138), requires before a license for engaging in the business of an auctioneer can be granted, and that although there has been no assignment of the bond from the Mayor, etc. to the plaintiff. The bond was intended to indemnify persons losing property by the dishonest acts of the auctioneer, and the mayor, etc. is merely their trustee.

In such a case it is not necessary to make all the obligors in the bond parties to the action, but the plaintiff may select as defendants any or all of the parties liable upon the bond.

The conversion, by an auctioneer, of property or the proceeds of property given to him for sale is a "fraudulent and dishonest practice" within the meaning of the bond which the law requires an auctioneer to give before can engage in that business in the city of New York.

(Decided November 12, 1884.)

Demurrer to a complaint on the ground of non-joinder of parties, and that it does not state facts sufficient to constitute a cause of action.

This action was brought against the sureties in a bond given by an auctioneer to the mayor, aldermen and commonalty of the city of New York on the granting of a license to him by the mayor to engage in the business of an auctioneer. The bond was in the penalty of \$2,000, and was conditioned to pay all damages caused by the fraudulent and dishonest practices of the auctioneer in his said business. The plaintiff asserts that the auctioneer converted certain property and appropriated the proceeds of certain other property belonging to the plaintiff, which was given to him for sale. The auctioneer was not made a party, and it did not appear that the bond given by him had been assigned to plaintiff.

Other facts are stated in the opinion.

Langbein Bros. & Son, for plaintiff.

H. E. Farnsworth, for defendant.

Viadero v. Morton.

BROWNE, J.—The questions involved arise upon demurrer to the complaint.

Section 454 of the Code of Civil Procedure permits an action upon a written instrument to be maintained against persons severally liable upon the same instrument, and any or all of such persons may be included as defendants in one action. This section re-enacts those portions of section 120 of the Code of Procedure which relate to the questions involved here. That section, so far as it affects the right to maintain an action in the form as is claimed here, received a construction in the court of common pleas in the case of *Field v. Van Cott* (5 *Daly*, 308), where two only of the obligors upon a bond were sued—the third and principal in the bond being omitted. The court held that the action was maintainable; that the common law rule was abrogated by the Code of Procedure (§ 120), and the plaintiff could select as defendants in the same action any or all of the parties liable upon the same written instrument. I find no distinction between that case and the case at bar. It follows that the first ground of demurrer must be overruled.

The second ground of demurrer presents two questions :

I. It is not alleged in the complaint that the defendant Stacom, who appears and demurs, is guilty of any of the wrongful acts complained of as the cause of damage to the plaintiff and constituting the alleged cause of action.

II. That the plaintiff cannot maintain the action because title to the bond is not shown in him by assignment from the mayor, aldermen and commonalty, &c., or leave to sue thereon first obtained from the court.

No provision of statute law exists specially applicable to this bond, which requires a person damnified by a breach of its conditions to first obtain an assign-

Viadero v. Morton.

ment, or special leave to sue, before he can maintain his action. Consequently we are relegated to existing general provisions of law to determine whether the action can be maintained by such person without such assignment, or leave being first obtained.

In this connection we must regard the mischief which it was intended to remedy, and the abuses which it meant should be abated by the enactment of the law which required the giving of a bond by an auctioneer before he could lawfully pursue his calling as such, within the city of New York (*Laws of 1853*, chapter 138). The preamble, section 1, of the act recites the existence of an evil among certain persons, whereby others by the fraudulent and deceitful practices and dishonesty of those persons are deprived of their property. The second section defines certain penalties to be imposed upon such persons who obtain money, goods or other property from persons designedly, and with intent to defraud such other persons. The third section requires a license to be obtained from the mayor before a person can engage in the business of an auctioneer, such license to be granted upon filing a bond with sureties in the penalty of \$2,000. The fourth section provides for a hearing before the mayor, of charges of violations of the act, and vests him with power to revoke licenses, commit the offender for trial and to declare the bond forfeited.

It is my duty to give such a construction to the act as will suppress the mischief and advance the remedy. The intention of the lawgiver is to be deduced from a view of the whole and every part of the statute, taken and compared together.

The language of the above act leaves little room for argument as to its meaning, intent and effect. Its various provisions are in harmony with the intent of the legislature to give the fullest and most ample security to the public, who might deal with persons licensed

Viadero v. Morton.

to pursue a calling in this city, which the act in effect declares was abused by vicious persons, who resorted to many subtle methods to deprive others of their property. Care should be taken, where violations of the provisions of the act were established, that all the remedies provided by law should be applied when invoked by a person defrauded. While the act provided penalties for the violation of its provisions which affected the personal liberty of the violator, it was also the clear intention to provide for the material and beneficial security of persons dealing with the auctioneer, who, by his fraudulent and dishonest practices, were deprived of their property. To give effect to the act and invoke the safeguards by it established, it is consistent with fair interpretation to hold that the cumulative remedies contained therein are susceptible of being exercised, when occasion requires, independently of each other. The remedy of imprisonment as a punishment for the violation of the peace and dignity of the state or the proceedings to be taken before the mayor, do not impair the right of a person damaged to pursue his remedy upon the bond to recover damages incurred for breach of its condition.

If the foregoing conclusions are correct, that the bond was intended to indemnify persons who lost their property by reason of the dishonest practices of the auctioneer, it seems to me that there can be no doubt as to the right of the plaintiff to maintain an action upon the bond without assignment from the mayor, aldermen and commonalty, &c. It is true that no provision is made in the act as to who shall be named obligees in the bond, nor where it is to be filed, but as its execution and filing are made conditions precedent to the applicant obtaining a license from the mayor to engage in the business of an auctioneer, he (the mayor) is impliedly authorized to receive the bond and nominate the obligees. Where the law vests the power

Viadero v. Morton.

in an officer it imposes the duties incident to that power. It gave the mayor the power to issue the license in the name of the corporation of which he was at the time chief executive officer. In taking the bond the mayor acted as a public official and exercised the power vested in him by law in harmony with the implied duty that powers of the nature conferred should be exercised in the name of the beneficiary which, in this instance, was the city of New York in its corporate name. Aside from the legal implication resolved from the power vested in the mayor to issue the license upon condition of the giving of the bond, the defendants are precluded from questioning the authority under which the mayor acted in receiving the bond in the form he did. Before their principal could act as auctioneer, a license was necessary. The mayor could not issue it without the bond. It was delivered in compliance with the legal right to demand it, conferred by the law under which it was given. The sureties permitted their principal to possess himself of the right to pursue his calling. He did so, and then violated his obligation. It is now too late to question their liability (*Supervisors Rensselaer v. Bates*, 17 *N. Y.* 245; *People v. Norton*, 9 *N. Y.* 178).

While the bond was taken by the mayor, &c., as obligees, and nominally as beneficiaries, it was only as trustees of an express trust for the benefit of any person injured by breach of its condition. The plaintiff in his complaint charges that the auctioneer converted certain property, &c.; appropriated the proceeds of certain other property sold by him which belonged to plaintiff and was given to the auctioneer for sale. It is charged that such acts on the part of the auctioneer were "fraudulent and dishonest practices," and within the provisions of the bond. In this conclusion I concur. The demurrer admits the facts. The complaint shows that the plaintiff was injured by

Viadero v. Morton.

the acts of the auctioneer, secured against by the bond, and that he is entitled to the proceeds of the recovery herein. No interest in the result, because of the special breach charged is shown to be in the mayor, &c. The plaintiff is the real and only party in interest, and the action is properly brought in his name (*Code Civil Pro.* § 449). The section referred to permits an action to be brought by the trustee of an express trust for the benefit of his "cestui que trust," but it does not preclude the real party in interest from suing to enforce the liability incurred by the obligors. The following cases fully illustrate the proposition, and reference to them is made without further comment (*Cudler v. Curry*, 44 *How. Pr.* 349; *Williams v. Kieran*, 25 *Hun*, 358).

It being shown that the cause for which the plaintiff seeks a recovery is within the terms of the obligation provided against and that the action is maintainable as brought, the defendants are liable for damages for the breach, without recourse having been first had against the principal. The condition of the bond is that the principal "shall refrain from all fraudulent, deceitful and dishonest practices." The principal did not refrain, but practiced them. The sureties make themselves privies to the acts of the principal when he does that which they all agree he will not do, and they are bound to the same extent that he would be.

Demurrer overruled ; judgment for plaintiff, with leave to the defendant to answer over within six days, upon payment of trial fee of an issue of law.

Estate of York.

ESTATE OF JOSHUA YORK, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, NOVEMBER,
1884.

§ 2743.

Surrogate.—Jurisdiction of, to determine rights of legatees.

The surrogate has jurisdiction upon the settlement of the accounts of an executor to fix and determine the rights of all who claim, as legatees, under the will of the testator, notwithstanding that the validity of some of the legacies is attacked.* [1]

Fraenznick v. Miller (1 *Dem.* 136), overruled; [1] *Matter of Verplanck* (91 *N. Y.* 439); [2, 4] *Riggs v. Cragg* (89 *N. Y.* 479); [3] *Purdy v. Hayt* (92 *Id.* 446) [6] followed; *Fiester v. Shepard* (92 *N. Y.* 251), not followed.[5]

(Decided November 20, 1884.)

Proceedings for the settlement of the accounts of an executor.

Sufficient facts are stated in the opinion.

C. W. Van Voorhis, for executor.

Lemuel Skidmore and *Abner C. Thomas*, for legatees.

ROLLINS, S.—This testator, by one of the clauses in the second article of his will, gives five hundred dollars “to the trustees of the Second avenue M. E. Church, corner of One Hundred and Nineteenth street, toward paying off the debt of the church.” By the same clause, also, he gives “to the managers or trustees of the Methodist City Mission \$500.” His executor having filed an account of his administration, now

* To the same effect, *Estate of Orser*, 4 *N. Y. Civ. Pro.* 129. *Contra*, *In re Brown*, 3 *Id.* 39.

Estate of York.

seeks to enter a decree for its judicial settlement ; but he attacks the validity of both the above named legacies, and suggests that the surrogate, for lack of jurisdiction to determine the questions thus raised, should direct the accounting party to retain in his hands a sum sufficient to meet any demands growing out of these bequests, that may be successfully prosecuted in a competent tribunal.

He claims that the bequest first named is ineffective by reason of the fact that the church in One Hundred and Nineteenth street is not now in debt, and was not in debt when the testator died. He claims also that there is no existing person or institution bearing the name of "Methodist City Mission," and none which is competent to take the bequest, whereof the will makes the Methodist City Mission the beneficiary.

It is insisted in behalf of the parties respectively claiming as legatees that the surrogate is fully authorized by the Code of Civil Procedure to determine these disputed questions.

Section 2743 of that Code provides that, "Where an account is judicially settled as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights."

The section further declares that, "Where the validity of a debt, claim or distributive share is not disputed or has been established, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same."

In the case of *Fraenznick v. Miller* (1 *Dem.* 136-151) ['] I contrasted the section just quoted from the Code with the statutory provision which it had superseded-

Estate of York.

ed, namely, section 71, title 3, chapter 6, part 2 of the Revised Statutes (3 Banks' 6th ed. 104). I referred to the fact that while by the earlier provision, the right of determining all questions concerning any debt, claim, legacy, bequest or distributive share, had been conferred upon the surrogate, the authority of that officer to make such determination is limited by the later statute to "debts, claims or distributive shares whose validity is not disputed or has been established."

Because of this fact, and because of the fact that Mr. Commissioner Throop had declared in his edition of the Code by a note to the very section under consideration, that it was the purpose of the codifiers to bring the letter of the new enactment into unmistakable conformity with the construction that the courts had put upon the old, I felt bound to hold in *Fraenznick v. Miller*, that whenever an executor or administrator should dispute the validity of a demand against his decedent's estate, whether such demand should be made in behalf of one claiming as creditor, or as legatee, or in any other capacity whatsoever, the authority of the surrogate in the premises would be straightway suspended, and would remain suspended until the validity of such demand should have been passed upon by some tribunal of competent jurisdiction, and by some other tribunal, of course, than the court of the surrogate.

While this interpretation was, in my judgment, unavoidable, I adopted it with no little reluctance, and am glad to find what seems to me abundant warrant for abandoning it, in certain recent decisions of the court of appeals.

In *Matter of Verplanck* (91 N. Y. 439), where questions similar to those here presented were under
[²] consideration. EARL, J., pronouncing the unanimous opinion of that court, declared that surro-

Estate of York.

gates "must have jurisdiction to construe wills, so far at least as is needful to determine to whom legacies shall be paid." Referring to the then recent decision in *Riggs v. Cragg* (89 N. Y. 479), he added: "We were unanimously of the opinion that they possessed such a power under the Revised Statutes before the Code of Civil Procedure, *and it was clearly not the intention of the Code to narrow or diminish the jurisdiction of surrogates, but rather to enlarge it.*" By the words italicised, taken in connection with their context, I understand that the propositions declared in *Riggs v. Cragg*, respecting the jurisdiction of surrogates upon final accountings, though those propositions in terms relate only to cases arising under the Revised Statutes, are pronounced to be equally applicable to cases arising under the Code.

In *Riggs v. Cragg*, a person claiming as legatee sought to enforce from his testator's executors the [?] payment of a disputed legacy. There were divers persons interested in the estate, whose rights would be affected by the enforcement of a decree in the petitioner's favor. None of these persons were cited or had appeared as parties to the proceeding. Commenting upon this fact, ANDREWS, J., pronouncing the opinion of the court, said: "When the surrogate can see that other persons claim, or may claim the same thing as the petitioner, and that a real question is presented as to the right of several persons to the legacy or fund, natural justice requires that he should not proceed to a determination, without the presence of all the parties who may be affected by the adjudication. The statute provides for bringing in all the parties in interest on the final accounting, and in that proceeding jurisdiction is conferred to settle and adjust conflicting rights and interests."

The learned justice subsequently referred to the oft-cited decision in *Bevan v. Cooper* (72 N. Y. 317), and

Estate of York.

after suggesting that, upon the reported facts of that case, there seemed to have been no necessity, as incident to the accounting or distribution, for the surrogate to assume the power of interpreting the testator's will, added: "It is doubtless true that a surrogate has no general jurisdiction in the construction of wills, but where the right to a legacy depends upon a question of construction, it must be determined before a decree for distribution can be made. The surrogate has, we think jurisdiction . . . upon a final accounting, where all parties interested are before the court, to determine such construction as incident to the authority to make distribution."

In "Matter of Verplanck" (*supra*), the court of appeals recently upheld a surrogate's authority to ['] determine, upon an executor's accounting, whether a provision in a testator's will should be deemed invalid as involving a suspension of the power of alienation, and whether by another provision directing distribution of a portion of his estate, the testator intended a distribution *per stirpes* or one *per capita*.

The opinion of RUGER, Ch. J., in *Fiester v. Shepard* (92 N. Y. 251), contains intimations that ['] are not, perhaps, in thorough harmony with the doctrine of the two cases last cited, but the doctrine has been still more recently reasserted by ['] the court of last resort (ANDREWS, J., pronouncing its opinion) in *Purdy v. Hayt* (92 N. Y. 446).

Upon the authority of these decisions, I must deny the motion of counsel for the executor, and, in the ['] decree about to be entered, must settle and determine the rights of all who claim as legatees under the will. A reference will be ordered for that purpose.

In re Jones.

IN RE JONES.

SUPREME COURT, NEW YORK COUNTY, CHAMBERS,
NOVEMBER, 1884.

§§ 8, 11, 14, 854-857, 2285, 2481 subd. 7, 3002.

Contempt—When criminal, punishable civilly.—Form of warrant of commitment —Fine.—Review.

The refusal of a witness on the trial of a civil action or proceeding to answer legal and proper questions, may be punished as a civil contempt, although the refusal was contumacious and might have been treated as a criminal contempt.

Where the warrant committing a witness to jail for contempt in refusing to answer certain interrogatories propounded to her while upon the witness stand in a proceeding in a surrogate's court, for the probate of a will, recited the facts without setting out the interrogatories, and committed her until she should answer "such legal and proper interrogatories,"—*Held*, that it sufficiently specified the act or duty to be performed.

It is not necessary to insert the particular interrogatories in the warrant for the commitment of a witness for refusing to answer questions in a surrogate's or other court of record; the rule is different in justices' courts and in certain proceedings before boards, arbitrators and committees, and even before judges and referees where they are expressly authorized by law to hear, try and determine a matter, and also, *it seems*, where the witness is proceeded against as for a criminal contempt even in a court of record.

The court has jurisdiction in civilly punishing a witness in a civil action or proceeding for refusing to answer questions properly put to him, to impose a fine not exceeding the amount of the complainant's costs and expenses, and \$250 besides, although it is not shown that any actual loss or injury has been produced by the witness's misconduct, and where there is an error in the amount of the fine, it can only be cured by appeal or motion, and cannot be reviewed upon *habeas corpus* or ancillary *certiorari*.

(Decided November 25, 1884.)

Motion on return of *habeas corpus* for the discharge of the prisoner.

In re Jones.

The prisoner, Miss Rebecca Jones, was a witness in a proceeding in the surrogate's court, New York county, for the probate of the will of one Louis Hammersley, deceased. While upon the stand certain questions were put to her which she refused to answer, whereupon she was committed to jail by the surrogate, until the questions were answered.

The warrant of commitment did not set out the interrogatories.

Further facts are stated in the opinion.

William H. Shepard, for the motion.

Franklin Bartlett, opposed.

BARRETT, J.—I. The prisoner was punished as for a civil contempt. Refusing to answer as a witness is none the less punishable civilly because the refusal was contumacious and might have been treated as a criminal contempt.

II. The warrant of commitment specifies the act or duty to be performed; namely, that the prisoner answer "such legal and proper interrogatories," that is, the legal and proper interrogatories previously recited, for refusing to answer which she was committed. These are the interrogatories "which," says the warrant, "may be propounded to her in this proceeding," and in answering which she may purge her contempt.

III. When the party proceeds civilly in a court of record it is not necessary to insert the particular interrogatories in the warrant of commitment. The statute only requires a specification of the act or duty to be performed. (*Code*, § 2285.) The duty here to be performed by the prisoner is plainly stated. She is to make answer to the interrogatories which were propounded to her upon the 19th day of May, 1884, while she was upon the witness stand at a surrogate's court

In re Jones.

held in the city, and which, notwithstanding the direction of the surrogate, she then and there contumaciously and unlawfully refused to answer.

The rule is different in justices' courts (*Code*, § 3002), also in certain proceedings before boards, arbitrators and committees; and even before judges and referees, when they are expressly authorized by law "to hear, try and determine a matter." (*Code*, §§ 854-857.) It may be, too, that the particular question should be inserted in the warrant where the witness is proceeded against as for a criminal contempt, even in a court of record. (*Code*, §§ 8, 11.) But I find no authority requiring the particular circumstances of the offense to be inserted in the mandate of commitment for a civil contempt in such a court. Under the present Code the surrogate's court is a court of record, and a surrogate, in court or out of court, has power to "punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner." (*Code*, § 2481, sub. 7.)

IV. As to the fine. The court had jurisdiction, although it was not shown that actual loss or injury had been produced by the prisoner's misconduct, to impose a fine not exceeding the amount of the complainant's costs and expenses, and \$250 besides. (*Code*, § 2285.) As the amount allowed in the present instance was within the statutory power of the court, the commitment is not void, and any error can only be cured by appeal or motion. Such error cannot be reviewed upon *habeas corpus* or the ancillary *certiorari*. (*People ex rel. Woolf v. Jacobs*, 66 *N. Y.* 8.)

The writ must be dismissed and the prisoner remanded.

Irr v. Schroeder.

IRR, AS EXECUTOR, ETC., RESPONDENT, v. SCHROEDER, APPELLANT.

COUNTY COURT, ERIE COUNTY, OCTOBER, 1884.

§§ 1695, 1699, 2876, 2901, 2902, 2916, 2917, 2920, 2925,
2933, 3063.*Justice of the peace.—Provisional remedies in court of.—Effect of error in replevin process on judgment.—Error in taxing costs.*

An attachment, order of arrest and writ of replevin, in a justice's court are, substantially, provisional remedies.^[5] and as a summons is issued in every case, the jurisdiction of the court does not depend upon their validity ^[6, 7] and they may be set aside and still the action continue to judgment if the summons has been properly issued and served upon the defendant.^[6] If a justice refuses to set aside an irregular provisional remedy and proceeds to judgment, the appellate court, on appeal, should not reverse a correct and meritorious judgment on account of the irregular provisional remedy, but should merely set aside the latter.^[10]

Where, in an action before a justice of the peace, to recover certain chattels, the affidavit and undertaking upon which a warrant to replevy the chattels was issued, were insufficient, and the justice refused to dismiss the action because thereof, but on a trial of the action, rendered judgment in favor of the plaintiff,—*Held*, on appeal, that the replevin should be set aside, but as there was nothing in the case requiring a reversal of the judgment on the merits, it should be allowed to stand;^[10, 13] that the defendant's motion should have been to set aside the replevin process, not to dismiss the action.^[11, 12]

In an action before a justice of the peace, the affidavit on which a writ of replevin is granted, must state the value of the property ^[1] and the undertaking given by the plaintiff must be executed by two sureties.^[2]

In an action to recover a chattel proof of demand before the service of the papers on the defendant is sufficient; the action is not commenced as to him until such service.^[3]

Irr v. Schroeder.

A justice's judgment should not be reversed by reason of an error in taxing costs.[⁴]

Fritze v. Pultz (2 *N. Y. Civ. Pro.* 142), not followed; [⁸] *McNeary v. Chase* (30 *Hun.* 491), followed.[⁹]

(Decided October 22, 1884.)

Appeal from judgment rendered by a justice of the peace.

The opinion states the facts.

A. Bartholomew, for appellant.

D. G. Jackson, for respondent.

HAMMOND, J.—Appeal from a judgment of a justice of the peace in an action of replevin.

This action was brought by the plaintiff as executor of the last will, &c. of Frederica Schroeder, deceased, to recover from the defendant a shot-gun, a blanket and a small quantity of tobacco, and some other small articles, which plaintiff claimed belonged to his testatrix; but the value of none of said articles was stated in the affidavit, either separately or in the aggregate, but were found by the justice upon the trial before him to be of the value of \$7.25.

It must be conceded that the affidavit was deficient in this respect, as subdivision 6 of section 1695, [¹] Code of Civil Procedure, especially provides that the affidavit shall state the value of the property, and this section is made applicable to justices' courts by the provisions of section 2920.

The undertaking was also deficient in that it was executed by only one surety, and two sureties are [²] expressly required by section 1699, which is also applicable to these proceedings in justices' courts made by section 2920.

The appellant claims that the proofs show no de-

Irr v. Schroeder.

mand made before suit brought, and therefore the
['] action could not be maintained, because the defendant was in lawful possession of the property.

I cannot agree with him in this conclusion, as the proofs show conclusively that a demand was made before the service of the papers upon the defendant; and that is sufficient, because the action was not commenced as to *him*, until the *service* of the papers upon him. (*Code Civ. Pro.* § 2876.)

Defendant also claims that the judgment should be reversed because the justice included more than \$5 costs in his judgment against him.

This position cannot be maintained, as it was many years ago provided by statute, that a justice's
['] judgment should not be reversed by reason of an error in taxing costs, and such is the law and practice to-day; but further than this the justice's return shows that only \$5 was taxed in his judgment against the defendant.

This brings us to a consideration of the important question raised by this appeal, and that is whether the judgment in this case should be reversed for the errors of the justice, in issuing the writ of replevin, upon an insufficient affidavit and undertaking, when it is conceded that the summons was properly issued, and personally served upon the defendant, and proper return thereof, made by the officer making the service.

I have carefully read the evidence, and find nothing in the case calling for a reversal of the judgment upon the merits, and the foregoing is the only question necessary to consider further upon this appeal.

So far as this court is concerned the question is a new one, but I am cited by appellant's counsel to the case of *Fritze v. Pultz* (2 *N. Y. Civ. Pro.* 142), which is a decision of the general term of the superior court of Buffalo, and which he claims is decisive of the principle which must govern this case, although that was a

Irr v. Schroeder.

case of attachment ; while the counsel for the respondent cites the case of *McNeary v. Chase* (30 *Hun*, 491) ; which he claims is decisive of the principle which must govern and control this case, although that was an action where the summons issued by the justice was accompanied by an order of arrest ; answering to the warrant of arrest, under the old practice, and which decision is substantially contrary to the holding of the superior court, above stated.

The attachment, the writ of replevin and the order of arrest, while taking the place of the like proceedings under the old practice, are, as now provided ['] by the Code of Civil Procedure, substantially provisional remedies, and constitute an entirely new practice in justices' court, quite analogous to the practice in courts of record in such proceedings.

Now, as in courts of record, a summons is issued in every case, and the jurisdiction of the court ['] does not depend upon the validity of the attachment, or the warrant of arrest, or the precept in replevin ; they may be set aside, and still the action continue to judgment, if the summons has been properly issued and served upon the defendant. (*Code Civ. Pro.* §§ 2902, 2917, 2933.)

Provisions are also made for motions by the defendant to the justice to vacate or modify the attachment (*Code*, § 2901), and the order of arrest (§ 2916), and for claiming a return of the property taken in replevin (§ 2925), in like manner as in courts of record.

But, suppose that upon a motion of this kind being made, the justice errs in his decision, and refuses to vacate the attachment, or to set aside the requisition in replevin, or the order of arrest, when he ought to have done so ; or does vacate and set them aside when he ought not to have done so ; and still proceeds with the trial, by virtue of the jurisdiction he has obtained from the issuing and service of the summons, and com-

Irr v. Schroeder.

mits no other error ; what is the remedy of the party, against whom the erroneous decision was made ?

This is the precise question presented by this appeal.

It is the prosecution of the action which is the end sought, and it is the issuing and service of the summons which gives the justice jurisdiction to attain ['] this end ; these provisional remedies are merely incidental to the cause of action, and the action may proceed with, or without them : and the disposition of any motion concerning them, can have but little bearing upon a proper disposition of the cause of action and a proper final judgment therein.

But the case of *Fritze v. Pultz*, before referred to, would seem to hold that upon appeal from the ["] judgment, *it* should be reversed for an error of the justice in granting an attachment upon an insufficient affidavit, although it should be conceded, that the judgment itself was proper and correct upon the merits : while *McMeary v. Chase*, before referred ["] to, seems to hold a contrary doctrine, the judge, while conceding that under the old practice such error would require a reversal of the judgment, says : "This new provision is excellent. It obviates the necessity of reversing a just judgment merely for some little imperfection in the affidavit or undertaking, upon which an order of arrest was obtained."

These remarks apply with equal force to an attachment or replevin, and it appears to me this is the ["] correct conclusion to be reached in applying these new provisions of the statutes ; and not reverse a correct and meritorious judgment, where the justice had jurisdiction, and has committed no error which could possibly affect the merits of the judgment. But in such case, the motion should *not* be to dismiss ["] the action, but to vacate and set aside the replevin process, or the attachment or warrant of

Irr v. Schroeder.

arrest as the case may be, which shall have been issued upon insufficient papers, and leaving the action to continue to judgment.

In this case the defendant raised specific objections to the papers, claiming that they were insufficient ['] in the particulars pointed out, but he asked too much when he asked the justice to dismiss the action, and his motion was properly denied. He should only have asked that the writ of replevin be set aside, upon the objections which he made to the papers, and *that* motion might have been granted, leaving the action to continue.

But the justice having committed an error in issuing his replevin-precept upon papers which gave ['] him no jurisdiction to issue it, and the specific objections having been made by the appellant, before the justice, to the insufficiency of the papers, the replevin itself should be set aside, but the judgment allowed to stand.

The defendant may enter a judgment herein, modifying the judgment by setting aside the writ of replevin issued by the justice and reversing his action in such writ; but affirming his judgment as to the value and disposition of the property, with ten dollars costs and three dollars disbursements, making \$13 to be paid by plaintiff to defendant.

White v. Rintoul.

WHITE, RESPONDENT, v. RINTOUL, APPELLANT.

SUPERIOR COURT OF THE CITY OF NEW YORK, CHAMBERS, MAY, 1884.

§ 1352.

Undertaking on appeal.—Form of, when guaranteed by corporation authorized to guarantee undertakings.

Where an appellant gave an undertaking to stay proceedings pending appeal, in which the plaintiff and a company authorized to guarantee bonds and undertakings by Laws of 1881, chapter 486, were named as obligors, and which was signed by the plaintiff and the president and secretary of the company, and guaranteed by the company,—*Held*, that the said company was not competent to guarantee such an undertaking so as to be accepted in place of two sureties; that the execution of the undertaking was insufficient as to the said company; also *Held*, that the acknowledgment of the execution of such undertaking by the president and secretary of said company in the usual form of an acknowledgment by individuals was insufficient.

(Decided May 1, 1884.)

Motion by respondent to disallow an undertaking and guarantee given on appeal.

The plaintiff recovered a judgment in this action for \$3,657, from which the defendant appealed to the general term of this court. To stay execution pending appeal, the defendant gave an undertaking, which, after reciting the recovery of the judgment, etc., continued: "Now therefore, we, James Rintoul [the plaintiff], of No. 156 West Sixteenth street in the city of New York, and The Fidelity and Casualty Company of New York, do hereby pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against said appellant on said appeal, not

White v. Rintoul.

exceeding five hundred dollars, and do also undertake that if the said judgment so appealed from, or any part thereof be affirmed, or the appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on the said appeal.

“Dated New York, April 12, 1884.

“J. RINTOUL.

“WM. M. RICHARDS, Pres.

“JOHN M. CRANE, Sec’y.”

An affidavit of justification in the usual form was annexed signed by the plaintiff solely, wherein he swore that he was a “house-holder within this state . . . worth the sum of \$5,000 over all his debts,” etc.

The acknowledgment on the undertaking (exclusive of the notary’s signature), read as follows :

“City and County of New York. ss :

“I certify, that on this 12th day of April 1884, before me personally appeared the above named James Rintoul and William M. Richards, Pres’t., and John M. Crane, Sec’y., to me severally known and known to me to be the individuals described in, and who executed the above undertaking, and they severally duly acknowledged to me that they had executed the same.”

Annexed to the undertaking was a guaranty entitled in the action of which the following is a copy.

“In pursuance of a provision of an act of the legislature of the state of New York entitled ‘An act to facilitate the giving of bonds required by law,’ passed June 13, 1881, The Fidelity and Casualty Company of New York, in consideration of one dollar to it in hand paid, the receipt whereof is hereby acknowl-

White v. Rintoul.

edged, hereby guarantees the performance of the covenants and conditions of the within undertaking.

"In witness whereof, the said Fidelity and Casualty Company has caused its corporate seal to be hereto affixed, and the same to be attested by the signature of its president and secretary.

[L. S.]

"WM. M. RICHARDS, President.

"JOHN M. CRANE, Secretary."

"City and county of New York, ss :

"On the 12th day of April 1884, before me personally appeared William M. Richards, to me known, who being by me duly sworn, did depose and say, that he resides in the city of Brooklyn, N. Y., that he is president of the Fidelity and Casualty Company of New York, the corporation described in and which executed the foregoing instrument ; that he knows the corporate seal of said company ; that the seal affixed to said instrument is such corporate seal ; that it was affixed by order of the Board of Directors of said company, and that he signed said instrument, as president of said company, by like authority, and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881.

[L. S.]

"JAMES C. MERIAM,

"Notary Public New York county."

The plaintiff excepted to the sufficiency of the sureties and to the form of the undertaking, and at the time fixed for the justification made this motion.

A. R. Robertson (Robertson, Harmon & Cuppia, attorneys), for the motion.

George W. Dillaway (Davenport & Leeds, attorneys), for appellant, opposed.

White v. Rintoul.

Charles A. Pfingsten, for The Fidelity and Casualty Company, opposed.

SEDGWICK, Ch. J., granted the motion, without writing any opinion, and an order was entered, the concluding part of which read as follows :

“ Ordered, that said undertaking and guaranty be, and they hereby are disallowed, and that the justification be, and it hereby is dismissed, on the ground that said undertaking is not joint and several, and that said company is not competent to guarantee an undertaking given by an appellant under section 1352 of the Code of Civil Procedure, so as to be accepted in place of two sureties. and that the execution of the undertaking, not of the guaranty, is insufficient as to the Fidelity and Casualty Company, and that the acknowledgment appended to the undertaking, not that appended to the guaranty, is insufficient as to the company.

“ It is further ordered, that the appellant may have three days after the entry and service of this order to give a new undertaking to stay plaintiff's proceedings, such as is required by section 1352 of the Code of Civil Procedure, and a guaranty such as is provided for by chapter 486 of the Laws of 1881. That such undertaking may be executed by two sureties without justification, and that upon proper justification by said company upon exception said bond will be approved.”

 Ross v. Wigg.

ROSS, RESPONDENT v. WIGG, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL TERM, JUNE, 1884.

§§ 550, 636, 719, 844.

Affidavits taken without the state.—Who authorized to take.—Form of certificate to.—Attachment.—Order of arrest.—When not vacated where prima facie case made out.—Contract.—When not adjudged illegal.—Doing business under fictitious name.

Where a motion to vacate an attachment or order of arrest is founded only on the original papers, the statements therein contained are, for the purposes of an appeal from an order denying the motion to be regarded as true, and if they establish a *prima facie* case against the defendant he should be required to satisfactorily answer or explain them before asking that the attachment or order of arrest be set aside.[¹]

A contract will not be adjudged illegal when it is capable of a construction making it valid.[²]

Where one Ross, a resident of Canada, for a long time carried on business in this state under the name of Ross & Co., without having any partner, and in that name sold the business by a written agreement, dated and executed at Quebec, Canada, which did not, in terms, provide where it was to be performed, but bound the purchaser to "remit" the payments to be made, to said Ross,—*Held*, that no place of performance being fixed, the rights and liabilities of the parties under it were to be determined by the *lex loci eo contractus* ;[³] that the statutes of this state prohibiting persons from transacting business under fictitious names, are penal laws and have no extra-territorial force ;[²] that if the contract was valid by the laws of Canada, where it was made and dated, it was valid everywhere ;[³] and the burden of showing that it was invalid by the laws of that place rested upon the one attacking its validity.[¹]

One who acquires property in a business conducted under a fictitious name, in violation of the law, does not forfeit the property thereby acquired or place it outside of legal protection ;[⁴] it is his, and is subject to sale and transfer by any of the modes known to the usage of business.[⁴] Whether a contract for the sale of property so acquired, and providing for payment therefor by the purchaser,

 Ross v. Wigg.

made in such fictitious name, and executed and to be performed within this state, would be invalid, *query?*^[5]

The statute (*Laws of 1833*, chap. 281), prohibiting the transaction of business under fictitious names, does not apply to commercial co-partnerships located and transacting business in foreign countries, and, *it seems*, a single person located and transacting business under a firm name in a foreign country, is authorized to use such firm name in carrying on a branch of that business in this state.^[6]

By section 844 of the Code of Civil Procedure, which provides for the taking of affidavits without this state to be used within the state, any officer authorized by the laws of this state to take and certify the acknowledgment and proof of deeds without the state, to be recorded in this state, is authorized to take an affidavit without the state to be used in an action in this state.^[8] FOLLETT, J., dissenting, *Held*, that section 844 vested the power of taking affidavits to be used in the courts of this state, in all officers of other states authorized by the laws of the state of their residence, to take and certify the acknowledgment and proof of deeds to be recorded in the state of the officer's residence, and that the section does not authorize officials of other states to take affidavits to be read in the courts of this state, unless they are authorized by the laws of the state of their residence, to take acknowledgments of deeds to be recorded in the state of their residence, except in cases specially authorized by statute.^[15, 16] The legislation on the subject reviewed.^[14, 17]

A judge of any court of record within the dominion of Canada, being authorized to take acknowledgments, may take an affidavit to be used in a court of this state.^[9]

An officer taking an affidavit without this state for use within the state, is not required to state in the jurat that he knows the affiant or has satisfactory evidence of his identity.^[10]

Where an affidavit taken without the state was accompanied by a certificate of the clerk of a court of record within the county in which it was taken, that the name of the judge who took the affidavit was to him "well known to be the autograph signature of said judge," — *Held*, that this was a substantial compliance with the statute requiring a certificate by the clerk that "he is well acquainted with the handwriting of such judge and verily believes his signature genuine."^[11] *contra*, FOLLETT, J., dissenting.^[12]

Instance of an action in which a *prima facie* case for the granting of a warrant of attachment and order of arrest, on the ground that the defendant was about to dispose of, and remove from this state

Ross v. Wigg.

his property, for the purpose of defrauding the plaintiff, was made out.^[12, 13]

(Decided October, 1884.)

Appeal from an order made at chambers in Oswego county denying a motion to vacate an order of arrest and a warrant of attachment.

On the 18th of December 1882, the plaintiff resided at Quebec, Canada, and had for a long time carried on business at that place under the name of "Ross & Co." without having any partner. For six years prior to that date he had also been engaged in the lumber business at Oswego, New York, under said firm name, having no partner therein. On that day, at Quebec, Canada, by a written agreement then and there dated, he in the name of "Ross & Co." sold said lumber business at Oswego, N. Y., to the defendant for the sum of \$87,743.32, of which no part was paid down or secured. The defendant, who at the time was the confidential agent and manager of the plaintiff, agreed to remit to him all collections and receipts from said business weekly, as fast as received. By the terms of the agreement he was permitted to use not exceeding \$8,000 from such collections, to erect a dock, which sum he was to repay within two years from January 1, 1883, with interest at seven per cent., payable semi-annually, and a commission of two and one half per cent. per annum, interest on the purchase price was to be computed every six months, at the rate of seven per cent. per annum, and the whole amount, excepting the eight thousand, was to be paid within nine months from January 1, 1883. The defendant was also to pay all of the debts of the plaintiff, contracted in said business and unpaid at the time of the sale. Subsequent to such sale, the plaintiff paid on account of such outstanding debts two drafts, drawn in Novem-

Ross v. Wigg.

ber 1883, amounting to \$6,531.25, the defendant having neglected and refused to pay the same. Between December 21, 1882, and June 23, 1883, the plaintiff, by the name of "Ross & Co." accepted, for the accommodation of the defendant, six drafts, amounting to \$17,735.23, and paid the same as they matured; each of the eight drafts above named was drawn, dated, and made payable in Canada upon this indebtedness, amounting in all to the sum of \$111,024.65, exclusive of the \$8,000 not yet due. The defendant paid \$29,791.21, the last considerable payment having been made August 1, 1883.

About the first of March 1884, the plaintiff commenced this action, which is upon contract, to recover from the defendant the balance unpaid of \$81,233.44, and upon a verified complaint, alleging the foregoing among other facts, and the affidavits of the plaintiff and one Pousette, setting forth said cause of action, and tending to show that the defendant was about to dispose of and remove his property, with the intent to defraud his creditors, an order of arrest and a warrant of attachment were granted by Justice CHURCHILL on the 7th of March 1884. The sheriff of Oswego county thereupon attached certain property of the defendant, but of what value does not appear, and on the 10th of March, 1884, arrested the defendant and confined him in jail of said county, in default of the bail required by the order of arrest, to wit, \$20,000. The affidavit of said Ponsette was taken before a judge in Canada, whose certificate was as follows, viz:

"The above affidavit was subscribed and sworn to before me, the undersigned, the judge of the county court of the county of York, the same being a court of record of the Province of Ontario, having a seal at the court house in Toronto, Ontario, this March 14, 1884, signed, 'John Boyd, Judge C. C. C. Y.' " A clerk's certificate was attached in these words, viz:

Ross v. Wigg.

"Dominion of Canada, Province of Ontario, county of York, ss. I, Walter McKinzie, who am a clerk of the county court of the county of York in said Province of Ontario, hereby certify that said county court of the county of York, is a court of record of said Province of Ontario, in the Dominion of Canada, and that said court has a seal; that John Boyd, Esq., is the judge of said court, and that the name of said judge John Boyd subscribed to the above jurat is to me known to be the autograph signature of said judge John Boyd.

"Witness my hand and the seal of said court, at the city of Toronto, in said province of Ontario, this March 4, 1884.

(Signed)

[L. S.]

"WALTER MCKINZIE,
Clerk of the County Court of the
County of York."

On the 19th of March, 1884, the defendant moved to vacate both the order of arrest and the warrant of attachment, upon the same papers on which they were granted, and before the same justice who granted them. The motion was heard at chambers, March 22, and denied March 28, 1884, but without prejudice to any application that might be made upon affidavits or other proof to vacate said provisional remedies, or to compel the plaintiff to elect between them under section 719 of the Code of Civil Procedure, or to reduce the amount of bail required by the order of arrest.*

* Several grounds were considered in deciding the motion, and urged in the briefs on appeal (*vide* extracts therefrom, *supra*), from the order setting aside the order of arrest and warrant of attachment, which are not referred to in the opinions written at general term. The opinion of the judge who decided the motion at chambers is, therefore, here reported.

 ROSS v. Wigg.

From the order denying said motion the defendant brings this appeal.

George N. Burt and *W. F. Cogswell*, for defendant, appellant.

There is no compliance with supreme court rule 25; there is no statement that no previous applica-

 ROSS v. WIGG.

SUPREME COURT, OSWEGO COUNTY, CHAMBERS, MARCH, 1884.

§§ 550, 636, 719, 844.

Attachment.-- Order of arrest.— Grounds for vacating.— Affidavit sworn to without the state.— Doing business under fictitious name.

It is not imperative that the court vacate a warrant of attachment and order of arrest because the affidavits on which they were granted do not comply with the rule requiring a statement that no prior application has been made for the order; it is in the discretion of the court.[¹]

The fact that a warrant of attachment or order of arrest which sufficiently states the ground on which it was granted, states in addition, matters which are not made grounds for its issue does not vitiate it.[²]

An affidavit taken without the state which is accompanied by a certificate of a clerk of a court of record of the place where it was taken that the name of the judge who took the affidavit was to him "well known to be the autograph signature of said judge" is not properly certified for use in a court of this state.[³]

An agreement or acceptance made in Canada, which violates the laws of this state against usury and against the use of the words " & Co.," when not representing an actual partner, will not be held invalid unless invalid by the laws of Canada, and that fact must be shown; it will not be inferred.[⁴]

On an application for an attachment, an affidavit by the plaintiff that "there is now due to deponent from said defendant on said indebtedness over and above all offsets and counterclaims the sum of," etc., substantially complies with the requirement of section 636 of the Code of Civil Procedure that there must be an affidavit showing "that the plaintiff is entitled to recover a sum stated therein over and above all counterclaims known to him."[⁵]

Instance of an action in which the papers on which an attachment and order of arrest were granted, stated and showed sufficient grounds therefor.[⁶]

Ross v. Wigg.

tion has been made for such order or warrant, and for this omission they should be set aside. See *Code*, § 17; Rule 25; *Schachne v. Kayser*, 66 *How. Pr.* 395. The judge below holds that a non-compliance with this

The discretion given in section 719 of the Code of Civil Procedure, as to vacating one of two or more provisional remedies granted in the same action, was undoubtedly intended to enable a court or judge to limit a party to one or the other remedy when either the one or the other should appear to be sufficient to secure or satisfy the plaintiff's claim, or when, upon the case as presented to the court, it should seem to be oppressive to allow both remedies.^[1]

(*Decided March 22, 1884.*)

Motion to vacate an attachment and order of arrest.

The facts are fully stated in the report of the general term opinions, *supra*.

George N. Burt and *W. A. Poucher*, for the defendant and motion.

C. G. French and *W. H. Kenyon*, for the plaintiff, opposed.

CHURCHILL, J.—This is a motion made upon the original papers to set aside the order of arrest and warrant of attachment heretofore granted in this action.

In deciding the motion no papers are considered except those upon which the order and warrant were granted. *Code*, §§ 568-683.

Among the grounds originally stated for the motion, were some relating to the undertakings, which have been amended upon the application of the persons executing them, which amendments seem to make the undertakings valid from the time of their execution. *Code*, § 730.

These grounds were not pressed by the counsel for the defendant on the argument, and are not considered now.

As to the other grounds for this motion:

1. Rule 25 does not make it imperative on the court to vacate an order founded on affidavits not complying with the rule, but leaves it to its discretion. *Bean v. Tonnelle*, 1 *N. Y. Civ. Pro.* 83.

No previous application is claimed to have been made. The warrant and order bear the same date, with the verification of the complaint and all but one of the affidavits used, making it unlikely any previous application had been made.

The delay in making this motion may be considered. Altogether this does not seem a case for the court in its discretion, on this ground to vacate these orders.

Ross v. Wigg.

rule was a matter of discretion, and has exercised that discretion in this case to uphold the arrest and attachment. This discretion ought *not* to be exercised to sustain an order of arrest. This motion was

2. The warrant of attachment states that the defendant "has disposed of and removed from this state, and is about to dispose of and remove from this state his property, . . . for the purpose of defrauding said plaintiff."

The order of arrest states that the defendant "is about to dispose of and remove from this state his property, . . . for the purpose of defrauding said plaintiff."

Each of these is a ground for the warrant or order stated in [2] the language of the Code, and therefore, I think, sufficiently stated. *Code*, § 550, sub. 2; and § 636, sub. 2.

The fact that each states, in addition, matters which are not made grounds for the issue of either does not vitiate them.

3. The affidavit of Alfred P. Poussette is not certified as required by section 844 of the Code, which now governs the taking of affidavits in foreign states, to be used in this state.

Before any legislation on the subject, courts were liberal in receiving affidavits verified in other states. *Welsh v. Hill*, 2 *Johns.* 378; *Marshall v. Mott*, 13 *Johns.* 423; *Tucker v. Ladd*, 4 *Cow.* 47; 1 *Duer Pr.* 106-312-313.

But since the legislature has made provision for the taking of such affidavits, and has pointed out the officers before whom they may be taken and the mode of their authentication, their action must govern.

This motion is therefore decided as though the affidavit of Poussette were not in the case.

4. It is claimed that the agreement and acceptance set up in the complaint are void as against the provisions of our statute, against the use of the words "& Co." when not representing an actual partner (*Laws* 1833, chap. 281), and that the agreement is also void for usury.

But it appears from the papers on which the order and warrant were issued, that the agreement and acceptance are all Canadian [4] contracts and are to be construed by and as to their validity, are governed by the laws of Canada. If they are invalid under those laws, that fact must be shown. It does not appear from the papers and will not be inferred.

As to the use of the words "& Co.," it is doubtful if the agreement and acceptances would be held invalid under the laws of this

Ross v. Wigg.

made as promptly as it reasonably could be. The case of *Schachne v. Kayser* holds (DANIELS, J.), that a non-compliance with this rule is good ground to move to vacate order of arrest, if made in time, and

state. *Laue* 1849, chap. 347; *Stoddard v. Key*, 62 *Hun.* 137; *Zimmerman v. Erhard*, 83 *N. Y.* 74; *Ryan v. Hardy*, 26 *Hun.* 176.

5. It is claimed that the affidavits are not sufficient to sustain the warrant of attachment, because not complying with section 636 of the Code, which reads: "The affidavit must show that the plaintiff is entitled to recover a sum stated therein over and above all counter-claims known to him."

The affidavit of plaintiff, after stating the facts as to the indebtedness claimed, adds: "And that there is now due to deponent [¶] from said defendant on said indebtedness over and above all offsets and counterclaims, the sum of \$81,233.44, and interest thereon from March 1, 1884."

A statement very similar has been held by the general term of the fourth department, a substantial compliance with the Code, and therefore, sufficient. *Alford v. Cobb*, 28 *Hun.* 22.

6. The last ground for vacating the warrant of attachment and order of arrest is that the affidavits upon which they were granted, [¶] do not state facts and circumstances to authorize their issue.

The grounds for their issue, as stated in them, are the same, and are:

1st. That the defendant has disposed of and removed his property from the state for the purpose of defrauding the plaintiff.

2d. That he is about to dispose of and remove from the state his property, for the same purpose. The first of these grounds is sufficient to sustain the warrant of attachment, and the second is sufficient to sustain either or both of these processes. *Code*, §§ 550, 636, 719.

1. The papers presented fail to sustain the first of these grounds. They do not show the defendant to have disposed of or sold his property at less than market rates, or in any other than the ordinary modes, or to have concealed, or to have attempted to conceal from the plaintiff the nature or extent of his business transactions.

The disposition which the papers show the defendant to have made of his property neither by logical deduction or fair inference can be said to have been made with intent to defraud the plaintiff or any other creditor.

2. As to the second ground, it appears from the papers that in the last week in February, 1884, the defendant was indebted to the plaintiff in upwards of \$80,000 past due, and that two drafts for

Ross v. Wigg.

before case has been noticed for trial. This defect, taken together with the other defects in the papers, stated in Point II., warrant the exercise of the discretion of the court, to vacate both writs. *Schachne v. Kayser*, 66 *How. Pr.* 395; *Bean v. Tonnelle*, 1 *N. Y. Civ. Pro.* 33.

\$18,000 and upwards accepted by the plaintiff for the accommodation of the defendant and upon his promise to provide funds for their payment at maturity were about to mature.

In that week the plaintiff called upon the defendant to know if the latter proposed to furnish funds to retire the drafts. The defendant at first offered to do this if the plaintiff would give him an additional credit by allowing him to draw on the plaintiff for the same amount; this offer he afterward withdrew, but offered to furnish \$10,000 for that purpose if the plaintiff would give him an additional credit for that sum as above. These offers the plaintiff declined, but urged the defendant to pay the above sums to apply on his indebtedness to the plaintiff.

The defendant said he had \$20,000 which he could pay thereon but which he refused to do. That he was intending to go to England, that he should hang on to the money, and that if the plaintiff pushed him for payment, he should not spare him, but make him lose all he could.

The affidavit of plaintiff with the telegrams attached, seems within the rule approved by the general term of this department, in *Bennett v. Edwards* (27 *Hun*, 352), and uncontradicted and unexplained, to be sufficient to establish for all purposes of the application for these processes; that on the 7th day of March, 1884, the defendant was in New York intending to sail on the next day for England. Taken altogether these facts seem to justify the conclusion that the defendant was about to dispose of or to remove from the state his property, with intent to defraud the plaintiff.

7. Should the plaintiff be required to elect which of these remedies he will retain and thereupon the other be dismissed?

The discretion given by section 719 was intended undoubtedly to enable the court or judge to limit a party to one or the other [?] remedy, when either the one or the other should appear to be sufficient to secure or satisfy the plaintiff's claim, or when upon the case as presented to the court it should seem to be oppressive to allow both remedies. *Rockford, &c. v. Boody*, 56 *N. Y.* 456, 460; *Duncan v. Guest*, 2 *N. Y. Civ. Pro.* 275.

Ross v. Wigg.

There is no compliance with section 636 of the Code of Civil Procedure to wit: there is no statement that the plaintiff is entitled to recover the sum stated therein *over and above all counter-claims known to him*. Code, § 636, sub. 2; Murray v. Hankin, 3 N. Y. Civ. Pro. 342; Smith v. Davis, 3 Id. 74; Crippen v. Schillinger, 30 Hun, 248; Donnell v. Williams, 21 Hun, 216; Ruppert v. Haug, 1 N. Y. Civ. Pro. 411; Neal v. Sacks, 15 N. Y. Weekly Dig. 476.

The allegations in the complaint show that the plaintiff cannot maintain this action. (1.) It affirmatively appears that the plaintiff without any actual partner was doing business at Oswego under the firm name of Ross & Co., and has been for many years last past. This is in direct violation of the statute. 3 R. S. (7 Ed.) p. 2239 (*Laws* 1833, chap. 281.) It reads as follows: § 1. "No person shall hereafter transact business in the name of a partner not interested in the firm, and where the designation 'and company' or '& Co.' is used it shall represent an actual partner or partners." § 2. "Any person offending against the provisions of this act shall upon conviction thereof be deemed guilty of a misdemeanor, and be punished by a fine not exceeding \$1,000." Swords v. Owen, 43 How. Pr. 176; Bank of U. S. v. Owens, 2 Peters (U. S. Sup. Ct.) 537; Hallet v. Haroon, 14 Johns. 290; Pennington v. Townsend, 7 Wend. 276; O'Toole v. Garvin, 1 Hun, 92; Wood v. Erie R. R. Co., 72 N. Y.

Whether this is a proper case for the exercise of that discretion does not appear from the papers upon which the warrant and order were granted, which are the only papers before the court.

The motion to set aside the warrant of attachment and order of arrest are therefore denied with \$10 costs, but without prejudice to any application that may hereafter be made to vacate or set aside the same upon affidavits, or to any motion that may be made to compel the plaintiff to make an election under section 719 of the Code, or to reduce the amount of bail required by the order of arrest.

 Ross v. Wigg.

196; *Zimmerman v. Erhard*, 83 *Id.* 74. Doing what the law forbids can not be enforced, whether *malum in se* or only *malum prohibitum*. *Bank of United States v. Owen*, *supra*. The papers upon which they were granted show affirmatively that there is no cause of action. *Manton v. Poole*, 67 *Barb.* 330; *Smith v. Davis*, 3 *N. Y. Civ. Pro.* 74; *Murray v. Hankin*, 3 *Id.* 342.

Again it will be presumed that the laws of Canada are like our own until the contrary appears. 2 *Parsons on Contracts*, 582.

C. G. French and *W. H. Kenyon* (*W. H. Kenyon*, attorney), for plaintiff-respondent.

Rule 25 simply gives to the court power to decide in its discretion whether or not an order shall in such case be set aside. This discretionary power has been exercised by refusing to vacate the order. *Bean v. Tonnelles*, 1 *N. Y. Civ. Pro.* 33. . . .

A contract made in a foreign state will be presumed lawful unless shown otherwise. Opinion of CHURCHILL, J. [Note *ante*, p. 268.] *Cutler v. Wright*, 22 *N. Y.* 472; *Merchants' Bank v. Griswold*, 72 *Id.* 472. . . . Our statute in regard to the use of fictitious names has no application to these Canadian contracts. Opinion of Judge CHURCHILL. [Note *ante*, p. 268.] *Stoddard v. Key*, 62 *How.* 137-144, 145; *Ryan v. Hardy*, 26 *Hun.* 136; *Zimmerman v. Erhard*, 83 *N. Y.* 74. A supplemental statute provides that it shall not apply to foreign commercial houses. *Laws of 1849*, chap. 347 (4 *Edm. Stat.* 452). The original statute in express terms forbids one person to use a firm name. Hence the modifying statute must be construed as authorizing a single foreigner doing business under a firm name, to transact business here under such name. *Laws of 1833*, chap. 281 (4 *Edm. Stat.* 448); *Laws of 1849*, chap. 347 (4 *Edm. Stat.*

Ross v. Wigg.

452). This contract of sale, if made here, would not be within the statute. It is not made in transacting a business, but in closing it out. Opinion of Judge CHURCHILL. [Note *ante*, p. 268.] Wood v. Erie Railway, 72 N. Y. 196.

VANN, J.—As the motion to vacate was founded only on the original papers, the statements contained therein are, for the purposes of this appeal, to be regarded as true, and, if they establish a *prima facie* ['] case against the defendant, he should be required to satisfactorily answer or explain them before asking that important remedies for the temporary security of the plaintiff should be set aside.

It does not appear that any of the several contracts set forth in the complaint were entered into, in violation of the usury laws of this state or of the statute prohibiting persons from transacting business under fictitious names. 3 R. S. (3 Ed.) 253, *Laws of 1833*, ['] chap. 281; *Laws of 1849*, chap. 347. These statutes are penal laws and have no extra territorial force. The Western T. & C. Co. v. Kilderhouse, 87 N. Y. 430. A contract will not be adjudged illegal when it is capable of a construction making it valid. ['] Lorillard v. Clyde, 86 N. Y. 384; Ormes v. Dauchy 82 N. Y. 443. The principal contract upon which this action is founded is the bill of sale, which was both dated and executed at Quebec, Canada; it purports to transfer a lumber business at Oswego, in this state, including stock on hand, accounts and mortgages. The plaintiff, a resident of Canada, had conducted this business at Oswego under the name of "Ross & Co." and apparently had thus acquired the property and interests transferred. Assuming that he had carried on the business in violation of the law, he ['] did not forfeit the property he had acquired thereby or place it outside of legal protection. Wood

Ross v. Wigg.

v. Erie R. R. Co., 72 N. Y. 196, 200. If he violated the statute he was liable to punishment therefor, but the property thus acquired was still his, and was subject to sale and transfer by any of the modes known to the usage of business, as the bill of sale was given, not to carry on but to terminate and close out the ['] lumber business, it is doubtful if it could be held invalid, even if it had been executed and was to be performed within this state, such a transaction does not come within the evil which the statute was designed to prevent, as it does not impose upon the public or induce credit to be given upon a false basis. Wood v. Erie R. R. Co., *supra*. Moreover, the act in question (*Laws of* 1833, chap. 281), does not apply to commercial copartnerships located and transacting ['] business in foreign countries, as they are permitted to use the styles or firms of their houses in this state. *Laws of* 1849, chap. 347. The two statutes when construed together appear to authorize a single person located and transacting business under a firm name in a foreign country to use such firm name in carrying on a branch of that business in this state.

The bill of sale does not in terms state where it is to be performed, but as it binds the defendant to "remit" to the plaintiff, weekly, all collections, the presumption is, that he was to remit to the plaintiff at his place of residence, but if it is silent as to the place of performance, the rights and liabilities of the parties under it are to be determined by the *lex loci contractus* (2 *Parsons on Contract*, 582; *Pomeroy v. Ainsworth*, 22 *Barb.* 118, 130; *Northrup v. Foot*, 14 *Wend.* 249); therefore, if it was valid by the laws of Canada, where it was made and dated, it is valid everywhere (*Merchants' Bank of Canada v. Griswold*, 72 N. Y. 474; *Potter v. Tallman*, 35 *Barb.* 182; *Story on Conflict of Laws*, § 282); the burden of showing that it was invalid by the laws of that province rests

Ross v. Wigg.

upon the defendant (*Cutler v. Wright*, 22 *N. Y.* 472; *Thompson v. Kitchum*, 8 *Term R.* 189). All of the contracts except the bill of sale were by their terms to be performed in Canada; the acceptances were all drawn, dated, made payable, and actually paid by the plaintiff there. Whether, therefore, the action is based upon the drafts themselves, or upon the implied promise to pay, springing from the fact of payment by the plaintiff for the benefit of the defendant and at his request, they are Canadian contracts, and are to be governed by the laws of the place where they were made.

The affidavit of Alfred P. Pousette was considered at the time of the original application for these provisional remedies, but not upon the motion to vacate, as the learned justice held that it was not certified as required by section 844 of the Code of Civil Procedure.

[⁹] By that section, any officer authorized by the laws of this state to take and certify the acknowledgment and proof of deeds without the state, to be recorded in this state, is authorized to take an affidavit without the state to be used in an action in this state. The section is new, and its object, according to the report of the commissioners who prepared it, was to empower all officers authorized to take acknowledgments to administer oaths (vol. 3 Commissioners' Report, § 817, note; *Throop's Code*, § 844); the word "state" as used in this section in each instance, means the state of New York; it was enacted with reference to the laws of this state, not of some other state. The section does not mean, as claimed by the appellant, that the affidavit may be taken before an officer authorized by the laws of a foreign state, or the state of his residence, to take and certify the acknowledgment of deeds. The expression, as used in this section, "before an officer authorized by the laws of the state to take and certify the acknowledgment and proof of

Ross v. Wigg.

deeds, means an officer there authorized by the laws of this state." There are many such officers, and many statutes have been passed upon the subject, which are in force at the time of the enactment of the Code of Civil Procedure (3 R. S. [7th Ed.] 221 ; *Laws of 1829*, chap. 222 ; *Laws of 1839*, chap. 205 ; *Laws of 1845*, chap. 109 ; *Laws of 1847*, chap. 170 ; *Laws of 1848*, chap. 195 ; *Laws of 1850*, chap. 270 ; *Laws of 1858*, chap. 259 ; *Laws of 1863*, chap. 248 ; *Laws of 1870*, chap. 208 ; *Laws of 1875*, chap. 136). By some of these statutes the officers authorized to take acknowledgments are empowered to take affidavits, and the commissioners in their note to section 817 (now § 844), say : "it is thought better that all officers authorized to take acknowledgments should be empowered to administer oaths, and that their acts should be authenticated in the same manner in both cases. We think that this is what the legislature intended in enacting the section in question.

By chapter 208 Laws of 1870, acknowledgment of deeds may be taken before the judge of any [°] court of record within the dominion of Canada.

By virtue of this act and of section 844 of the Code, Judge BOYD was authorized to take the affidavit of Mr. Pousette, but a question is raised as to its authentication. The act of 1870 (*supra*), provides that no acknowledgment shall be valid unless the officer taking the same knows, or has satisfactory evidence that the person making it is the individual described in and who executed the instrument. It also requires that a certificate of the clerk should be attached, authenticating the court, office, officer, his handwriting, &c., it is insisted that the affidavit was not properly certified, because the judge did not state that he knew Mr. Pousette or had satisfactory evidence of his identity. Section 844 of the Code does not require that the certificate of the judge should state this. The statute of

Ross v. Wigg.

1870, by implication at least, does require it in [10] the case of deeds. Nearly all other statutes relating to the acknowledgment of deeds, whether taken within or without the state, also require it, yet it is not required in the jurat of an affidavit. Section 844 does not state what the certificate of the judge must contain, but simply requires that the affidavit must be "certified by him to have been taken before him." It does require that the judge's certificate should be authenticated by a certificate of the clerk as to his official character and the genuineness of his signature. In other words, the form of the clerk's certificate is, while the form of the judge's certificate is not, prescribed by the statute, so far as an affidavit is concerned. Thus the analogy of all other statutes relating to jurats and acknowledgment is observed, we do not hold that it would be proper for an officer, either within or without the state, to take an affidavit without either knowing the affiant or having satisfactory proof of his identity. We simply hold that such fact need not be certified by the officer in the jurat.

The certificate of the clerk literally follows the requirements of the act of 1870 in all respects, except that instead of stating in the language of the statute that "he is well acquainted with the handwriting of

such judge, and verily believes his signature genuine," he certifies that "the name of said judge,

John Boyd, subscribed to the above jurat, is to me known to be the autograph signature of said judge John Boyd." We think this is a substantial compliance with the statute, because it not only implies all that the statute requires, but includes more, and furnishes a better safeguard (*Meriam v. Harsen*, 4 *Edwards Ch.* 70; affirmed 2 *Barb. Ch.* 232; *Jackson v. Guman*, 2 *Cow.* 552; *Jackson v. Livingston*, 8 *Johns.* 149).

The moving papers show that the defendant was

Ross v. Wigg

indebted to the plaintiff in the sum of \$89,233.44, of which all but \$8,000 had been past due for five [?] months, during which period only \$50 had been paid thereon; that this debt was for the purchase price of and for moneys advanced in a lumber business that he was conducting, and from which he received large sums of money; that instead of remitting his collections to the plaintiff weekly, as he had agreed in writing to do, he retained substantially all that he received during the period of seven months immediately preceding the granting of the provisional remedies in question; and although he admitted that he had large sums on hand, yet he refused to pay the same to the plaintiff; that he ceased to make payments on this debt in August, 1883, yet continued after that to sell and reduce his stock and property, until not more than \$40,000 worth remained, that he had substantially no property aside from said business which he had purchased of the plaintiff wholly on credit, in December, 1882, and which he had agreed to pay for by October, 1882, with the exception of \$8,000, that in March, 1884, when the provisional remedies were granted he was owing the plaintiff \$89,233.44, or \$1,490.12 more than the original purchase price, so that his indebtedness to the plaintiff during the fourteen months that he had carried on the business had increased instead of diminished; that in November, 1883, he refused to give plaintiff a mortgage upon a dock then recently constructed by him for the amount of plaintiff's money invested therein; that during the same month, and after his large debt to the plaintiff was past due, he attempted to settle \$10,000 that he had taken from the lumber business upon the lady to whom he was engaged to be married and actually paid over the money to trustees for her benefit, stating that he did it so that if anything happened in regard to his business she would

Ross v. Wigg.

have that sum to fall back upon ; that at the same time he further stated that he had plaintiff in his hands, and could do with him as he liked ; that he never intended to pay him at the time agreed upon and should not pay him until he got ready, and that he intended to bring plaintiff to his terms, and could fix his property in twenty-four hours so that he could get nothing out of it ; that said \$10,000 was subsequently repaid him by the trustees upon the refusal of the lady's father to allow the marriage to take place ; that in January, 1884, he said to plaintiff, "Why do you watch me so ? This is the fourth time you have been here ; if you are not satisfied, buy me out," and upon the plaintiff then offering to buy him out, he refused to sell, defied the plaintiff, and told him to do his best ; that in February, 1884, he admitted that he had \$20,000 that he could pay to plaintiff, but refused to do so unless the plaintiff would give him credit to draw for a like amount, and when this was declined he said to plaintiff, "If you push me for payment I will not spare you, I will make you lose all I can ;" that subsequently he withdrew even that offer, but offered to pay \$10,000 if plaintiff would allow him to draw for a like amount, and when the plaintiff declined this but asked him to pay \$10,000 on his debt, he refused, saying that he would hang on to the money ; that on February 12th, 1884, he told said Pousette that he intended to sail for England in about ten days ; that on the 17th of that month he mortgaged to his brother for \$1,700 a piece of real estate worth \$4,000 but which was subject to prior mortgage for \$2,270 ; that the defendant is a widower with one child, and never resided in the United States until he purchased said business ; that on the fourth of March he was in the city of New York with three trunks, and on the sixth and seventh of March plaintiff received telegrams from his agent to look after the

Ross v. Wigg.

movements of defendant in that city, stating that the defendant was expected to sail for Europe on the eighth; that on the seventh the clerk of the hotel where the defendant boarded in Oswego informed the plaintiff that the defendant had gone to Europe; that the week before the defendant told the plaintiff that he intended to go to England.

We think that these with other facts not recited, made out a *prima facie* case, and gave the justice [13] jurisdiction. Where a debtor who owes a large debt that is past due, and has a large sum of money that he ought to pay upon that debt, refuses to pay anything to his creditor upon demand, without giving any explanation for such refusal, slight evidence of a threatened removal or disposition of his property will authorize the inference of fraudulent intent. Where a man of very small estate is largely indebted, and attempts to settle upon his intended wife a large sum of money wholly disproportioned to his property, so that if anything should happen to his business she would have something to fall back upon, it is evidence of fraudulent intent. Where a debtor declares that he does not intend to pay his chief creditor until he gets ready, but does intend to bring him to terms, and that he can speedily fix his property so that such creditor can get nothing out of it, and subsequently, when asked to pay something on account from nearly \$20,000 he had on hand, refuses and threatens that if pushed for payment he will make said creditor lose all he can, such declarations and threats are not consistent with an honest purpose, and without proof of any further act tend to show that he is about to remove or dispose of his property, with intent to defraud (*Gasherie v. Apple*, 14 *Abb. Pr.* 64; *Livermore v. Rhodes*, 27 *How. Pr.* 506). When, under all these circumstances, it further appears that the debtor, having recently stated that he was going to

Ross v. Wigg.

England, gives a mortgage for \$1,700 to his brother, leaves his business, and is found in the city of New York with three trunks, and with \$20,000 in money either in his possession or unaccounted for, apparently intending to sail for England the next day, we think that the conditions of the statute relating to orders of arrest and warrants of attachment are fully complied with, and that it is incumbent upon the defendant to answer or explain these allegations before a provisional remedy based thereon is set aside. The order appealed from should be affirmed with costs and disbursements. Order affirmed, with costs and disbursements.

HARDIN, P. J., concurred.

FOLLETT, J. (Dissenting.)—The affidavit of Pousette was verified before a judge of a county court of the province of Ontario, which court has a seal. The clerk of the court certified under seal, that the person before whom the affidavit was taken, was at the time a judge of the court, and that the signature is genuine, but fails to certify that the judge was authorized by the laws of the province, to take and certify the acknowledgment and proof of deeds to be recorded in that province.

Section 25, 2 *R. S.* 396, authorizing affidavits to be taken in foreign countries before a judge of a court [“] having a seal, was repealed by chap. 417. *Laws of 1877*. Affidavits may now be taken in foreign countries before commissioners appointed pursuant to chapter 136, *Laws of 1875* (3 *R. S.* [7th Ed.] 2230), or before the officers authorized by the fifth and sixth sections of chapter 3, part 2nd, of the revised statutes (1 *R. S.* 757), to take the proof and acknowledgments of deeds conveying real estate, and also by any consul or vice-consul or minister resident of the United States

Ross v. Wigg.

appointed to reside at any foreign port or place. *Laws of 1854*, chap. 206.

It is assumed by the counsel for the respective parties that the word "state" in section 844 of the Code of Civil Procedure, embraces foreign countries, and that the section is applicable to affidavits taken without the United States, which I greatly doubt. But, conceding the correctness of the assumption for the purposes of this case, I think the affidavit is not properly certified.

An affidavit verified before an officer of another state cannot be used in an action or special proceeding in this state,—except where it is otherwise specially prescribed by law,—unless the officer before whom the affidavit is verified is authorized by the law of his state to take and certify the acknowledgment and proofs of deeds to be recorded in his state; and the official character of the officer, the genuineness of the signature and that he is authorized to take and certify the acknowledgment and proof of deeds to be recorded in his state, must be certified under the name and official seal of the clerk, register, recorder or a prothonotary of the county in which such officer resides, or by the clerk of any court thereof having a seal. *Code Civil Procedure*, § 844; *Laws of 1848*, chap. 195, as amended by chap. 557, *Laws of 1867*, § *R. S.* (7 Ed.) 2224. This section of the Code evidently has reference to the statutes cited, and they must be read and construed together.

Chapter 208, *Laws of 1870*, authorizes the officer before whom the questioned affidavit was taken to take the acknowledgment of deeds to be recorded in this state. The argument is that by the section of the Code above cited, the authority to take affidavits to be used in the courts of this state is vested in, and limited to such officials of other states as are by the statutes of this state authorized to take acknowledg-

Ross v. Wigg.

ments by virtue of holding certain designated offices in other states. I think the intention was to vest the power of taking affidavits in all officers of other states authorized by the laws of the state of their residence, to take and certify the acknowledgment and [16] proof of deeds to be recorded in the state of the officer's residence, and that the section does not authorize officials of other states to take affidavits to be read in the courts of this state, unless they are authorized by the laws of the state of their residence to take acknowledgments of deeds to be recorded in the state of their residence, except in cases specially authorized by statute.

The clerk of a county, or of a court of another state could not have official knowledge that a particular officer within his jurisdiction was authorized by the laws of this state to take the acknowledgment of deeds and could not make the required certificate.

Some light may be thrown on this section and the reason for it, by briefly considering the course of [17] legislation on the subject of acknowledgments taken in other states and territories.

Authority to take acknowledgments has from time to time been conferred by the statutes of this state upon designated officials of other states and territories. But it was found that officers accustomed to the discharge of such duties were designated by different official titles in the various states and territories, and it was inconvenient to designate appropriate officials in all of the states and territories by their official titles. To avoid this difficulty and to enlarge the number of officials who should possess this authority, chap. 195, *Laws of* 1848 was passed—and amended by chap. 557, *Laws of* 1867—vesting the power to take acknowledgments of instruments to be recorded and read in evidence in this state, in any officer of any other state or territory authorized by

Barnes v. Gilmore.

the laws thereof to take the proof and acknowledgment of deeds.

It was the intention of the legislature not to restrict but to enlarge the class of officials of other states authorized to take and certify affidavits to be used in this state. The affidavit of Poussette ['] verified March 4, 1884, is not certified as required by the section of the Code above cited and cannot be considered on this appeal.

This construction of section 844 is in accordance with *Phelps v. Phelps*, 6 *N. Y. Civ. Pro.* 117; *aff'd*, 32 *Hun*, 642; *Williams v. Waddell*, 5 *N. Y. Civ. Pro.* 191; *Harris v. Durkee*, 5 *Id.* 376. Excluding the affidavit of Poussette, the evidence is insufficient to sustain the order of arrest and attachment. The order of the special term denying the motion to vacate the order of arrest and set aside the warrant of attachment should be reversed with costs.

BARNES v. GILMORE.

SUPREME COURT, ONEIDA COUNTY, SPECIAL TERM,
JUNE, 1884.

§§ 500, 501.

Pleading.—*Counterclaim, when sufficient.*—*Tenant denying landlord's title.*—*Res adjudicata.*—*Complaint in action to set aside conveyance, and agreement to reconvey on the ground that they are an usurious mortgage.*

The counterclaim permitted by section 500 of the Code of Civil Procedure, must tend in some way to diminish or defeat the plaintiff's recovery, and, except in an action on contract, arising out of the contract or transaction set forth in the complaint as the foundation

Barnes v. Gilmore.

of the plaintiff's claim, or connected with the subject of the action.[¹]

In an action to set aside a deed of real property and a contract to reconvey, on the ground that they were in fact a mortgage given to secure an usurious loan, and for an accounting for rents and profits received by the defendant while holding under such deed, a claim for certain rents alleged to be due the defendant from the plaintiff for use of a part of the premises during a part of the period the defendant held under said deed is properly pleaded as a counter claim.[²]

Where one B. conveyed certain real property to one G., and took from him an agreement to reconvey, and subsequently leased a portion of the premises so conveyed,—*Held*, that although the deed and agreement were in fact a mortgage made in pursuance of an usurious agreement and therefore, void, when B. made a new contract accepting the defendant as her landlord, she was estopped so long as she remained in undisturbed possession under that contract from denying G.'s title; that she could not set up the invalidity of the deed in summary proceedings to recover possession of the premises for non-payment of rent due under the lease, nor would an adjudication as to the validity of the deed made, in such proceeding be *res adjudicata*, and a bar to an action in equity, brought by B. against G. to set aside the deed.[^{3, 6, 7}]

Where a complaint alleged that a conveyance of real property and a contract to reconvey were, in fact, a mortgage to secure a certain usurious loan, and that the loan was made by the settlement by the defendant, after such conveyance, of certain debts owing by the plaintiff, which, together with a doubtful claim against the plaintiff's husband, were to be paid the defendant in full by her, as a condition of such reconveyance notwithstanding any rebate he might secure from any debt in settling it, and that this mode of making the loan was devised to cover the usury,—*Held*, that the complaint alleged a cause of action; that the fact that the money was not paid to the plaintiff, but was paid for her benefit and with her consent would not change the real character of the transaction.[⁸]

People *ex rel.* Ainslee v. Howlett (13 *Hun*, 139), distinguished.[^{3, 4}]
(Decided June 12, 1884.)

Demurrer by plaintiff to certain defenses and a counterclaim alleged in the answer.

The opinion states sufficient facts.

Barnes v. Gilmore.

D. E. Stoddard, for plaintiff and demurrer.

E. D. Mathews, for defendant, opposed.

VANN, J.—By her complaint the plaintiff sets forth in substance that on the 10th of November, 1876, she owned certain real estate in the city of Utica, worth \$17,500, that it was incumbered by various liens amounting to over \$13,000, and had upon it an uncompleted building for the construction of which she was indebted to mechanics and meterial men in divers sums which she was not able to pay. That she applied to the defendant for a loan to complete the building and pay such debts; that he exacted as a condition of making the loan that she should convey the premises to him and take back a written contract providing that he should complete the building, pay the just claims and liens for work and materials, retaining the benefit of any abatement that he could secure, and that she should have the right to purchase the premises at any time within five years by paying all his expenditures for the benefit of the property, including at their face value such claims and liens as he should purchase or settle at a discount, and including as a part of his advances a doubtful claim of \$1,900, that he had against her husband; the rents received to be applied in reduction of the sum to be paid upon such purchase by her; that this arrangement was corrupt and usurious, and the same was made and carried into effect by the conveyance of the property, the execution of the contract, the completion of the building and the payment of the claims and liens, many of them at a large discount; that said sum of \$1,900 was intended as a bonus, over and above legal interest upon the loan of the money represented by the expenditures made by the defendant for the benefit of the property, and, together with the abatements from said claims settled at less than

Barnes v. Gilmore.

their face, a contrivance and cover for usury. No money is alleged to have been delivered to the plaintiff by the defendant, but it is claimed that said advances were in effect a loan. Said written contract as set forth in the complaint provides that in no event shall it be construed as a mortgage.

The relief demanded is that the conveyance and contract be declared usurious and void, and the defendant required to account for the rents and profits. There is no demurrer to the first defense, which admits certain allegations of the complaint, denies the same, especially that there was any loan or agreement therefor, and alleges that the transaction was a purchase, with a refusal to resell within a certain period and upon certain conditions, that the plaintiff has failed to perform; but the defendant has performed in part and is ready to perform in full. The second answer is a counterclaim for rent, use and occupation of part of said premises by the plaintiff, amounting to \$2,412, of which only \$675 has been paid, and judgment is demanded by the defendant in his favor for the balance. The third answer alleges the letting of part of said premises by the defendant to the plaintiff from April 1, 1878, to April 1, 1879; that on the 22d of March, 1879, summary proceedings were instituted by the defendant before a justice of the peace to recover possession from the plaintiff for non-payment of rent, returnable on the 25th when the plaintiff appeared therein and filed an affidavit denying the facts upon which the summons was issued, and "alleging substantially all the equitable claims set forth in the complaint herein;" that a trial was had, a witness sworn on either side, and the justice decided that this defendant as landlord, was entitled to the possession of the premises; that the judgment entered accordingly remains in full force, and a warrant to dispossess was duly issued thereunder. By his fourth answer the

Barnes v. Gilmore.

defendant alleges that on February 2, 1883, the plaintiff and her husband rented of the defendant by a lease in writing and in the usual form, a part of the premises in question, and entered and occupied thereunder, and that upon the expiration of the term they were duly dispossessed by a judgment in summary proceedings as tenants holding over.

The third and fourth answers are alleged as "a bar to any recovery by the plaintiff and as an adjudication in favor of defendant against said plaintiff, that defendant is the owner in fee of said premises, and that said plaintiff has no claim, legal or equitable, against the same or against this defendant arising out of said contract or of the facts alleged in said complaint."

To the second, third and fourth answers the plaintiff demurs on the grounds that they are insufficient in law upon their face "as a counterclaim," and that the facts stated are not "sufficient to sustain and to constitute a valid defense and counterclaim." She further demurs to the second answer on the grounds that the counterclaim does not arise out of the transaction set forth in the complaint and does not state facts sufficient to constitute a cause of action.

I. The counterclaim permitted by section 500 of the Code of Civil Procedure must tend in some way to diminish or defeat the plaintiff's recovery, and except in an action on contract must be a cause of action arising out of the contract or transactions set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. *Code Civ. Pro.* § 501.

The counterclaim pleaded in the second defense conforms to the requirements of the statute. The plaintiff, as a part of the relief demanded, asks for an accounting for the rents and profits of certain premises during a certain period. The counterclaim is for

Barnes v. Gilmore.

certain rents due from plaintiff to defendant for a part of the same premises during a part of the same period.

It therefore tends to diminish the plaintiff's recovery. It is connected with the subject of the action, which is the real estate in question, and arises out of the transaction set forth as the foundation of the plaintiff's claim, to wit: the execution of said deed and contract. It contains all the elements of a good cause of action for rent, or use and occupation, viz.: ownership by the landlord, actual occupation by the tenant, and an agreement by her to pay at a specified rate for a specified time in advance.

The position of the learned counsel for the plaintiff, that this action is in tort for wrongfully depriving her of her lands, cannot be sustained. This is not an action of ejectment or at law to recover the possession of lands wrongfully withheld, but is a suit in equity to set aside a certain deed upon the ground that it is void for usury. No fraud is alleged. The deed was voluntarily given. If it is void for usury it is because a contract to which the plaintiff was a willing party, is in violation of a statute. If the statute was violated the plaintiff intentionally aided in the act.

II. The third and fourth answers and the grounds of demurrer thereto are sufficiently alike in principle to be considered together. In each of these answers an adjudication by a tribunal of competent jurisdiction in a controversy between the parties to this action, that the conventional relation of landlord and tenant existed between them is pleaded as a bar. The plaintiff concedes that as long as that relation thus adjudicated upon continued to exist, she could not dispute the title of the defendant, but contends that when that relation ceased and she was no longer in possession, she could set up title in herself.

In one of the proceedings to dispossess her, she is alleged to have set up as a defense the facts constitut-

Barnes v. Gilmore.

ing her cause of action herein, and if this was regular she had a right to plead the same defense to the other proceeding. If, therefore, the justice of the peace had jurisdiction to adjudicate upon such a defense, the plaintiff has had her day in court and cannot be heard again upon that subject.

In *The People ex rel. Ainslee v. Howlett*, 13 Hun, 138, affirmed 76 N. Y. 574, it was held that although the statute regulating summary proceedings permitted only a denial by the tenant of the allegations of the landlord, still an allegation by the tenant showing that the lease was void for usury was equivalent to a denial that there was a lease. It is going but a step further to hold in this case that if the deed was void for usury, the lease predicated upon the deed was voidable by the tenant, and that hence these facts when alleged amounted to a denial of the tenancy. The main difference between the case cited and the case at bar, is that in the latter the lease was not a part of the original transaction but was executed subsequently. It was held in effect in *The People ex rel. Ainslee v. Howlett (supra)* that the issue of usury could be tried in a summary proceeding. Therefore, if the defendant's right to dispossess the plaintiff would have been defeated by the determination of the issue of usury against him, the determination of that issue in his favor must be a bar to this action. The allegation of usury amounted to a denial and this seems to have been permitted by the court of appeals, notwithstanding the usual rule that a tenant cannot dispute his landlord's title. This was upon the ground, however, that the person appearing to be a tenant, in reality was not a tenant, because the instrument apparently creating the tenancy was void as part of an usurious agreement. The lease in this case was not part of an usurious agreement but was a subsequent and independent contract. The original trans-

Barnes v. Gilmore.

action took place Nov. 10, 1876, whilst the first lease was in March, 1877. I think that when the plaintiff made a new contract accepting the defendant as ['] her landlord, she was estopped so long as she remained in undisturbed possession under that contract from denying his title.

My chief reason for this conclusion which I have reached after some hesitation, is that the lease was not a part of the original transaction and hence was not directly affected by the alleged usury. The lease was as valid as it would have been if the landlord had never had any title by an usurious contract or by any other contract. It had the same effect as it would have had if the landlord's title had been void for any reason other than for usury. The fact that a lessor never owned the land and never had any interest in it or right to lease it does not permit the tenant, while still in possession, to deny his landlord's title.

Wood's Landlord and Tenant, 372; *McAdam's Landlord and Tenant*, 422. It is one thing to allege that the lease itself is a void contract and another to allege that the lease is invalid because a different and prior contract is void. In the latter case there is a new and independent recognition of the landlord's title. The tenant could not deny that there was any lease, as it is intimated in *The People v. Howlett*, that, in the case of a lease void for usury, can be done. He would

have to admit the existence of the lease that he ['] entered and was holding under it and then deny in effect that the landlord had any title, or in other words deny what in the lease he had admitted. This, I think, cannot be done in any case except when the lease containing such admissions is void and ineffectual for any purpose.

III. The defendant insists that the complaint does not set forth a cause of action and that hence a demurrer to the answer will not lie. I do not think that

 Adams v. City of Utica.

the deed and contract are usurious upon their face, but it is alleged that an usurious agreement was made and that the deed and contract were merely the form adopted as a contrivance to conceal the usury. If

that was the case, the fact that the money was not [] paid to the plaintiff, but was paid for her benefit and with her consent would not change the real character of the transaction. If it was intended to be what upon the face of the papers it appeared to be, a sale of real estate with an agreement to resell on certain terms it could not be affected by usury. But if it was intended to be what the complaint alleges it was, a loan carefully concealed under the form of an [] innocent business contract, then it was usurious and void.

The demurrer is overruled as to the second count of the answer, but is sustained as to the third and fourth counts.

 ADAMS v. THE CITY OF UTICA.

SUPREME COURT, ONONDAGA COUNTY, SPECIAL TERM,
OCTOBER, 1884.

§ 1013.

Reference.—When compulsory, will not be ordered in action by attorney for professional services. — Proof of value of services in such an action where sum in gross claimed.

Where in an action by an attorney to recover for professional services rendered in three matters, the defendant admitted the performance of the services and only contested their value,—*Held*, that notwithstanding a gross sum was claimed in the complaint, the plaintiff might prove the value in gross, or at his option prove the value of the services in each step of the action in which they were ren-

Adams v. City of Utica.

dered;[²] that the action would not require the examination of a long account,[¹] and was not referable;[³] but the parties were entitled to a trial by jury.[³]

(Decided October 25, 1884)

Motion by plaintiff to refer the issues made by the pleadings.

The facts are stated in the opinion.

Charles D. Adams, plaintiff in person, for the motion.

E. D. Mathews, for defendant, opposed.

KENNEDY, J.—The complaint contains two counts. The first for services rendered by the plaintiff for the defendant upon its retainer as an attorney and counsellor of this court in the examination by him of questions relating to the Utica & Mohawk Railroad Company, for which the plaintiff seeks to recover \$160. The second count is for services of a like character rendered by the plaintiff in and about a contract between said defendant and the Utica Waterwork Company, and the rights and liabilities of such cities thereunder, and also for services rendered by the plaintiff in an action subsequently brought on said contract by said Water Company, for which the plaintiff claims to recover fifteen hundred dollars. The answer of the defendant, together with a stipulation now tendered the plaintiff, admits the services claimed to have been performed by him, and only contests the value of the same. A bill of particulars furnished by the plaintiff contains several items for the services rendered, separately stated, but all growing out of the above mentioned employment. The motion presents two questions.

First. Is the case one in which a compulsory reference can be ordered by the court?

Adams v. City of Utica.

Second. If so, should the court in the exercise of a sound discretion order such reference?

The first question presented involves a substantial right, and is therefore the subject of an appeal. (*Martin v. Windsor Hotel Co.*, 70 *N. Y.* 101.) The claim of the plaintiff is based upon two retainers or employments by the defendant, and a gross sum in each case is sought to be recovered. Except when the trial will require the examination of a long account, neither party can be deprived of his right to a trial of the issues by a jury. In my judgment, under the pleadings and stipulation the trial of the issues herein ['] will not require the examination of a long account within the legal definition of the proposition.

A gross sum is claimed in the complaint for the services rendered and upon the trial the plaintiff may ['] prove the value in gross, or at his option prove the value of the services in each step in the action in which they were rendered. (*Felt v. Tiffany*, 11 *Hun*, 63; *Bathgate v. Haskins*, 59 *N. Y.* 533; *Thomas v. Reab*, 6 *Wend.* 503; *Dickinson v. Mitchell*, 19 *Abb. Pr.* 286.) The most the plaintiff can claim is that his demand is composed of two items requiring simply the proof of their value. It is held in *Waring v. Chamberlain*, (14 *N. Y. Weekly Dig.* 564), that such an action is not referable, but that the parties are entitled to a trial by jury. See also *Tracy v. Stearns* (12 *Id.* 533); and *Merritt v. Vegelius* (28 *Hun*, 420). I have examined the cases referred to by the learned plaintiff, and find in them nothing which conflicts in any manner with the doctrine enunciated in those above cited. The case of *Ruger v. Belden* (27 *Hun*, 405), afterwards affirmed in the court of appeals will not justify a reference in this case.

The motion is therefore denied with ten dollars costs to the defendant.

People *ex rel.* Herkimer v. Assessors of Town of Herkimer.

THE PEOPLE *ex rel.* THE HERKIMER & MO-
HAWK RAILROAD COMPANY v. THE AS-
SESSORS OF THE TOWN OF HERKIMER.

SUPREME COURT, ONEIDA COUNTY, SPECIAL TERM,
OCTOBER, 1884.

§§ 723, 1991, 1992, 2129.

Certiorari.—Assessors of town to be designated in, by individual names.
—Effect of omission of seal.

The assessors of a town are not a board or body against which an action will lie without mentioning in the process the names of the persons who are such assessors; they have, as a body, no associate or official name, and consequently a writ of certiorari directed to "the assessors of the town," etc., without mentioning the names of the individual assessors is defective, and must be amended or dismissed.

A writ of certiorari must be issued under the seal of the court, but the omission of the seal does not make the writ void; the defect may be cured by amendment.

(Decided October 24, 1884.)

Motion to quash a writ of certiorari, under chapter 269 of the Laws of 1880, to review an assessment made upon property of the relator by the assessors of the town of Herkimer.

Further facts appear in the opinion.

A. B. Steele, for the defendant and motion.

S. Earl, for the relator, opposed.

VANN, J.—A writ of certiorari to review the determination of an inferior tribunal is a state writ, which, by the express provisions of the statute is required to be issued under the seal of the court before which it

People *ex rel.* Herkimer v. Assessors of Town of Herkimer.

is returnable. (*Code of Civil Procedure*, §§ 1991, 1992.) An assessment of property by the assessors for the purpose of taxation, is a determination by an inferior tribunal within the meaning of section 2140, of the Code of Civil Procedure. The writ in question should therefore have been issued under the seal of this court. It is not, however, void by reason of this defect, which may be cured by amendment. (*Code* §§ 241, 723.) The writ is also defective in that it is directed to "The assessors of the town of Herkimer," instead of to the individuals who are the assessors of that town, naming them and adding the name of their office. (§ 2129 *Code Civ. Pro.*) The mode of addressing these writs is now fixed by law, and the practice which prevailed to some extent before the adoption of the present Code can no longer be followed.

Section 2,129 of the Code requires the writ to be directed to the body or officer whose determination is to be reviewed. If an action would lie against the board or body in its associate or official name, this section further requires that the writ should be directed to the board or body by that name, otherwise to the members thereof by their names. The assessors of a town are not a board or body within the meaning of that section. An action would not lie against "The assessors of the town of Herkimer," without mentioning in the process the names of the persons who are such assessors any more than it would lie against the commissioners of highways of that town, without asserting their names in the summons. The assessors of a town have, as a body, no associate or official name. None such is mentioned in the statutes providing for their election and prescribing their duties and powers. (1 *R. S.* 824, 935.)

Boards of Supervisors (1 *R. S.* 8611), of Commissioners of Excise (2 *R. S.* 932); of Equalization (1 *R. S.* 946), and other boards are bodies having an official

People *ex rel.* Hoyle v. Osborne.

name independent of the official name of the officers composing them. An action might be brought against such a board by its official or associate name, but not against assessors, because they have no official name when acting together that they do not have when acting separately. As an affidavit has been furnished stating the names of the assessors of the town of Herkimer, I think the writ should be amended in this respect also. The other grounds upon which the motion to quash was based are not sustained. An order may be entered granting the motion to dismiss the writ with costs unless the relators, within ten days after notice of this decision pay \$10 costs of motion to the counsel for the respondents, and upon such payment being made, an order may be entered amending the writ in the respects above mentioned *nunc pro tunc*.

THE PEOPLE *ex rel.* HOYLE v. OSBORNE.

SUPREME COURT, ONONDAGA, SPECIAL TERM, JANUARY, 1884.

§§ 2015 *et seq.*, 2019.*Habeas corpus.*—To secure custody of child.—By whom issued.

A petition by a wife living separate from her husband, for a *habeas corpus* for the purpose of removing her minor child from the custody to which it had been committed by its father and to have it committed to her, should be presented to the court and the writ should be issued by the court; a judge at chambers cannot issue it. The failure to state in a petition for a *habeas corpus* that the person in whose behalf the writ is applied for, is not detained by virtue of a final order of a competent tribunal made in a special proceeding or of an execution or precept issued upon such order, is a fatal defect.

(Decided January 5, 1884.)

People *ex rel.* Hoyle v. Osborne.

Motion by defendant to dismiss an *habeas corpus* issued herein.

The opinion states the facts.

Thomas Hogan, for the defendant and motion.

C. S. Kent, for the relator, opposed.

CHURCHILL, J.—The writ in this case issues upon the petition of the relator, the mother of John Hoyle, an infant six years of age, who desires to take the child from the custody to which it has been committed by the father, and to have it committed to her own custody. The writ was issued by a justice of the court at chambers, but was made returnable at a special term of the court.

The revised statutes gave the supreme court the right to issue the writ at the instance of a wife living separate from the husband, and thereupon to determine as to the custody of an infant child. (2 *R. S.* 148, § 12.)

The chancellor also, independent of the statute and as a part of the power of the court of chancery derived from the common law, might by *habeas corpus* cause an infant child to be brought before him, and might thereupon commit the charge and custody of the child to the mother, against the wishes of the father, if the interest of the child so required. (*People v. Mercein*, 8 *Page*, 47; *Mercein v. People*, 25 *Wend.* 64.)

This power the chancellor could exercise at chambers as well as at term, and for its exercise the court of chancery was always open, and to this power by virtue of section 16 of the judiciary acts of 1847 (*Laws of 1847*, chap. 280, § 16), the justices of the supreme court succeeded. (*People v. Wilcox*, 22 *Barb.* 178, 194, 195; *Wilcox v. Wilcox*, 14 *N. Y.* 575.)

People *ex rel.* Hoyle v. Osborne.

The cases established that under the judiciary act of 1847 the justice of the supreme court had power to entertain proceedings of this kind at chambers as well as at term, and that in entertaining them they acted as a court. Chapter 417 of the *Laws of 1877* repealed subdivision 21, section 16 of the judiciary act of 1847, and since that repeal justices of the supreme court, when not sitting as a court, have not that power.

The objection, therefore, that the petition should have been presented to the court, and the writ issued by the court seems to be well taken. (See 24 *Barb.* 521 ;* 1 *Duer*, 709 ;† 59 *How.* 174.‡)

The petition is also defective in not stating, in substance or otherwise, that the person in whose behalf the writ is applied for, is not detained by virtue of a final order of a competent tribunal made in a special proceeding, or of an execution or precept issued upon such order.

This is particularly required by the Code, and the defect is fatal. (*Code*, § 2019 ; *People v. Cowls*, 59 *How. Pr.* 287.)

This case does not come under section 2025 of the code since that applies only to the case of an *illegal* imprisonment or restraint, while the detention of the lad, John Hoyle, as shown by the papers in this case, is a legal one, although one from which the *court*, if his interest should be shown to require it, may relieve him.

The proceedings should be dismissed, but without prejudice to any future proceedings that may be taken in the interest of the infant.

* *People v. Humphreys.*

† *People v. Cooper.*

‡ *People ex rel. Ward v. Ward.*

In re N. Y., &c. R. R. Co.

IN RE APPLICATION OF THE NEW YORK, WEST
SHORE AND BUFFALO RAILROAD COM-
PANY TO ACQUIRE TITLE TO CERTAIN
REAL ESTATE OF WILLIAM A.
& SARAH J. JUDSON.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL
TERM, JUNE, 1884.

§ 997.

*Appeal.—Report of commissioners to proceeding to acquire land for rail
road, how corrected.*

Where, on an appeal from the report of commissioners appointed in a proceeding by a railway company to acquire title to real property the stenographer's minutes of the testimony taken before the commissioners which was annexed to and formed a part of the commissioner's report were asserted to be incorrect,—*Held*, that the report should be sent back to the commissioners to settle the minutes upon a hearing on notice; that the court should not, in the absence of bad faith or culpable irregularity, undertake to say for the commissioners what the record should be.

Appeal by the landowners from the order of the Oswego special term denying a motion to correct the printed case.

Upon the hearing before the commissioners, a stenographer was employed to take minutes and his report of the testimony and proceedings was attached to the report of the commissioners as being the minutes of the testimony taken by them. The report of the commissioners having been confirmed at special term, the railway company appealed from the order of confirmation to the general term. The printed papers on such appeal having been served, the respondents therein, the landowners, made a motion at

In re N. Y., &c. R. R. Co.

special term to have them corrected, claiming that they were defective in that they did not contain admission of the attorney of the railway company as to the title of the landowners and objections based on such admission. On the part of the company it was denied that there was any such admissions or objection. It was held at special term that upon the whole case the landowners failed to show themselves entitled to the amendments asked for.

E. J. Richardson and *A. L. Johnson*, for landowners, appellants.

P. B. McLennon, for the railway company, respondent.

MERWIN, J.—By the statute the commissioners were required to reduce the testimony taken by them, if any, to writing, and to make a report of their proceedings with the minutes of the testimony taken by them, if any. 2 *R. S.* (7th ed.) 2551, § 16.

The minutes are, therefore, a part of the report and as such, are filed and become a part of the case on appeal. If either side claims that the minutes as returned are incorrect the query with us is whether the commissioners are not the ones to settle that matter in analogy to the settlement of a case on appeal from a trial court. If this court, either at special or general term, should undertake on conflicting affidavits to determine what evidence was taken or what admissions or objections were made before the commissioners, would it not be recognizing a rule of practice that in its operation would naturally lead to undesirable results? Would not this in effect allow a report to be contradicted and impeached by affidavits? (See *Rochester and Genesee Valley R. R. Co. v. Beckwith*, 10 *How. Pr.* 168; *N. Y. and Erie R. R. Co. v. Corey*, 5 *Id.* 177.) The commissioners act in a

In re N. Y., &c. R. R. Co.

judicial character with limited powers, and it is their record as a judicial body that comes up on appeal. Should the appellate court in the absence of bad faith or culpable irregularity undertake to say for them what the record should be? We think not.

It seems to be conceded on both sides that the amendments claimed are of a material character. Upon the papers before us it looks somewhat doubtful about an admission having been as formally made as is claimed by the landowners. Still, at that stage of the case it may be that the attorney for the company supposed that the fee of the title was in Mr. Judson but incumbered by a street, while at a subsequent period in the case upon information it was claimed that the fee in that part covered by the street was not out of Mr. Judson. An argument in this line might harmonize to some extent the conflicting view of the parties. No bad faith is charged upon the commissioners, nor any irregularity. They do not in fact pass upon the correctness of the stenographer's minutes prior to their being attached to and filed with their report. It was assumed that they were correct. We think we should assume that in case the commissioners are called upon to settle in fact the minutes, it will be done with proper regard for what in fact occurred.

In our opinion the report should be sent back to the commissioners to settle the minutes upon a hearing on notice. We must therefore reverse the order and allow the appellants to apply to the commissioners to correct the minutes of the testimony and proceedings had before them on eight days' notice. If the commissioners, or a majority of them, shall after hearing the parties conclude that the minutes filed are incorrect they may correct them in such manner as shall make them conform to the evidence and admissions or objections in fact taken or made and the

Cole v. McGarvey.

corrected minutes may be filed with the clerk, *nunc pro tunc*. As the question involved is new, the reversal will be without costs to either party.

HARDIN, P. J., concurred.

COLE, AN INFANT, BY COLE, HIS GUARDIAN *ad litem*,
v. MCGARVEY *et al.*

SUPREME COURT, ONEIDA COUNTY, SPECIAL TERM,
JUNE, 1883.

§§ 421, 472.

Discontinuing action.—When order, ineffectual after special appearance of defendant.—Effect of failure to acknowledge consent to be guardian *ad litem*.

Where, after the defendant in an action appeared specially therein, for the purpose of moving to set aside an order appointing a guardian *ad litem* of the plaintiff, an infant, but before he had appeared generally, the plaintiff procured an order *ex parte* discontinuing the action,—*Held*, that unless the plaintiff shows that the motion was without foundation he should pay the costs of the motion before getting the benefit of the discontinuance.

An order appointing a guardian *ad litem* is irregular when the consent of the person named as guardian to act as such is not acknowledged, and should be set aside, and an action brought by the guardian under such appointment, dismissed.

(Decided June 16, 1883.)

Motion by defendant to set aside the order appointing the guardian *ad litem*, and to dismiss the action on the ground that the petition for the appointment of the guardian does not show that the proposed guardian is a competent and responsible person, and that the consent of the proposed guardian is not acknowledged.

The opinion states sufficient facts.

Cole v. McGarvey.

S. J. Burrows, for defendant and motion.

J. Frank Rogers, for plaintiff, opposed.

MERWIN, J.—The appearance of the defendant in this action is specifically for the purposes of this motion only.

After the service on plaintiff's attorney of the motion papers, he, upon a stipulation signed by him and his affidavit showing the state of the case, entered an order without notice that the action be discontinued without costs, and served a copy of the order on each of the defendants. It is claimed on the part of plaintiff that he had a right to discontinue without costs, a general appearance not having been put in, and that such discontinuance is a defense to this motion.

It has been held that a plaintiff has a right to an order of discontinuance without costs before appearance, although after a retainer in fact by a defendant of an attorney. (14 How. 95; 7 Hill, 520; 10 N. Y. 500.) But what the rule would be in case of special appearance has not been decided. By such an appearance, the plaintiff certainly has notice that the defendant has employed an attorney and instituted a proceeding which, if successful, may entitle him to recover of the plaintiff the costs of motion. When, after such knowledge, the plaintiff discontinues, he takes the risk of being able to show that the motion is without foundation. If he shows that, then he may well claim that the discontinuance is complete. If he does not show that, then he should pay the costs of the motion before getting the benefit of the discontinuance.

No defense is presented to the motion except the order of discontinuance. The order appointing the guardian is irregular by reason of the consent not being acknowledged as required by section 472 of the

Engle v. Fischer.

Code. For that reason an order may be entered vacating the proceedings for the appointment of the guardian and dismissing the action with \$10 costs of motion, with leave to plaintiff, within ten days after the service of the order to be entered herein, and upon payment of such costs of motion, to enter an order of discontinuance.

ENGLE, APPELLANT v. FISCHER, RESPONDENT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM, NOVEMBER, 1884.

§ 401.

Statute of Limitations.—*What coming into the state does not amount to a "return" thereto.*—*Construction of statute.*

Where one F., a resident of Austria, accepted a draft, and thereafter and before it became due, absconded from Austria and came to the city of New York, and there assumed and lived under a fictitious name for the purpose of concealing himself from his creditors,—*Held*, that the statute of limitations did not commence to run as against the holder of the draft until he discovered the presence of F. within the state;[^{3,4}] that the coming into this state and continuing therein concealed under a fictitious name to avoid the pursuit of creditors, was in legal effect no coming in until the day that he was discovered.[^{1,2}]

In the construction of statutes the judge is vested with authority to disregard the letter in order, in a given case, to attain the ends of justice.[²]

Troup v. Smith (2 Johns. 32) distinguished.[⁵]
(Decided December 1, 1884.)

Appeal from a judgment entered upon a trial before the court without a jury, a trial by jury having been waived.

Engle v. Fischer.

The facts are stated in the opinion.

B. Lewinson, for plaintiff, appellant.

The word "return" as applicable to a debtor, it has been held, applies as well to persons coming from abroad, as to citizens of the country going abroad for a temporary purpose and then returning. *Angell on Lim.* § 206; 3 *Parsons on Contracts* (6th ed.) [105] and numerous cases there collated; *Ruggles v. Keeler*, 3 *Johns.* 263; *Carpenter v. Wells*, 21 *Barb.* 594; *Bulger v. Roche*, 11 *Pick. (Mass.)* 36; *Cole v. Jessup*, 2 *Barb.* 313; *Dwight v. Clark*, 7 *Mass.* 515.

Such an effect should be given, if possible, to the provisions of the statute of limitations as will not impute to the legislature an intention to do an injustice, especially as to clauses in the statute which purport to save demands, where there has been no opportunity of suing the defendant, by reason of his non-residence, absence or otherwise. *Crosier v. Tamlinson*, 2 *Mod. R. (Eng. K. B.)* 71-73; *Forbes v. Smith*, 30 *Eng. Law & Eq.* 602; *Chandler v. Villettr*, 2 *Saund. (Eng. K. B.)* 120, 121; *Sage v. Hawley*, 16 *Conn.* 114-115; *Swayn v. Stephens*, 3 *Cro. (Eng. K. B.)* 245; *Lafonde v. Ruddock*, 24 *Eng. Law & Eq.* 249; See opinion of MAULE, J.; *William v. Jones*, 13 *East. (Eng. K. B.)* 440; *Gillman v. Cutts*, 3 *Foster's (N. H.)*, 384, 385; *Smith v. Bond*, 8 *Ala.* 386. . . . The policy of the law is not to make contracts void to a greater extent than the mischief to be remedied renders necessary. *Broom's Legal Maxims*, (7th ed.) 727.

The intent plainly expressed is, that every creditor shall have six full years to sue in the courts of this state, and that he shall not lose his demand except by such omission to sue as the laws deem voluntary and negligent. 2 *R. S.* 295-299, §§ 18, 24, 26, 27, 32-37, and Code, §§ 330-412; *Ford v. Babcock*, 2 *Sand.* 519,

Engle v. Fischer.

528, 529; *Cole v. Jessup*, 10 *How. Pr.* 515; *Gilman v. Cutts*, *supra*; *Smith v. Bond*, 8 *Ala.* 386; *Vanlandingham v. Huston*, 9 *Ill.* 125; *Harden v. Palmer*, 2 *E. D. Smith*, 172; *Richards v. Maryland Ins. Co.*, 8 *Cranch (U. S.)* 91, 92.

It was obvious there might be cases where. . . there would be an entire omission to commence a suit within the time limited, without the least fault or neglect on the part of the claimant, and where the principles of natural justice would therefore plainly require that his rights should be saved. *Sage v. Hawley*, *supra*.

When cases present themselves in which no laches can be imputed to the plaintiffs, but great injustice would be done by applying to such cases the effect of the statute, the conclusion of reason and of the law is, that such cases were not in the minds of the legislature when enacting that law. *Richards v. Maryland*, *supra*.

The courts have uniformly so "construed" the statute as to bring it within these general principles. *Olcott v. Tioga R. R. Co.*, 20 *N. Y.* 223.

It has been repeatedly held that a defendant who is simply out of the state is *beyond seas*, so as to bring the demand within saving clause of statutes, using that phraseology. *Anonymous*, 1 *Shower (Eng. K. B.)* 91; *Ruckmaboye v. Mettichund*, 32 *Eng. Law & Eq.* 85; *Lane v. Bennett*, 1 *Mees & Welsb. (Eng. Exch.)* 70; *Murray v. Baker*, 3 *Wheat. (U. S.)* 141; *Bank of Alexandria v. Dyer*, 14 *Peters (U. S.)* 141; *Pancoast v. Addison*, 1 *Harr. & Johns. (Md.)* 150. And these clauses have been applied to foreigners who never were in the state until the suit was brought, and who could not "return," within the literal or ordinary sense of that term. *Ruggles v. Keeler*, 3 *Johns.* 267; *Dwight v. Clark*, 7 *Mass.* 515; *Bulger v. Roche*, 11 *Pick. (Mass.)* 32, 40; *Van Hemert v. Porter*,

Engle v. Fischer.

11 *Metc. (Mass.)* 210; *Graves v. Week*, 19 *Vermont*, 179; *Forbes v. Smith*, 30 *Eng. Law & Eq.* 602. So the phrase out of the state embraces all defendants who are beyond its jurisdiction, so as to disable their creditors from commencing actions against them, even though they are within its territory. *Sleight v. Kane*, 1 *Johns. Cas.* 236; *Smith v. Bond*, *supra*. So, though their condition was such when the demand fell due that they could neither return, nor even come into the state afterwards; *e. g.*, where they have died abroad, never having been here. *Davis v. Garr*, 6 *N. Y.* 124; *Douglass v. Forrest*, 4 *Bing. (Eng. C. P.)* 686; *Benjamin v. Degroot*, 1 *Denio*, 151; *Lafonde v. Ruddock*, 24 *Eng. Law & Eq.* 239. The above, and similar phrases, even when used in saving clauses relating to the absence of the *creditor*, have been uniformly applied in the same extensive and liberal sense to save the demand. *Lafonde v. Ruddock*, 24 *Eng. Law & Eq.* 239; *Townsend v. Deacon*, 3 *Excheq. (Eng.)* 706; *Strithorst v. Graeme*, 2 *Wm. Bl. (Eng. K. B.)* 723; *Williams v. Jones*, 13 *East, (Eng. K. B.)* 439. So the word "person" in such and like clauses is sufficiently comprehensive to embrace foreign corporations as well as natural persons. *Olcott v. Tioga R. R. Co.*, 20 *N. Y.* 223; *Louisville v. Leston*, 2 *Haw. U. S.* 497.

By similar reasoning, and by like rules of construction, the courts have established the principle—that in order to set the statute in operation and to take a case out of the exceptions created by section 40), the debtor's return to (*i. e.* "coming into") the state must be public and notorious.

A return . . . within the chartered limits of the state, but to which the jurisdiction of the state did not extend, would not be within the exception of the statute, any more than a secret and clandestine return within the jurisdiction of the state. In both cases the intent of the statute would be defeated—the

Engle v. Fischer.

opportunity afforded the creditor of collecting, or at least suing for his debts. *Smith v. Bond*, 8 *Ala.* 386; See 3 *Parsons on Contracts*, *96, and cases cited; *Angell on Lim.* § 206; *Ford v. Babcock*, 2 *Sand.* 518; *Cole v. Jessup*, 10 *N. Y.* 96, 102; *S. C.*, 2 *Barb.* 309; *Fowler v. Bailey*, 3 *Mass.* 201; *Little v. Blunt*, 33 *Id.* 359; *Randall v. Wilkins*, 4 *Denio.* 577; *Fowler v. Hunt*, 10 *Johns.* 464.

The statute . . . in providing that the limitation should commence on the debtor's return (*i. e.* "coming") into the state, must intend such a return ("coming into") as would enable his creditors, using reasonable diligence, to arrest his body as security for the debt. By returning ("coming") into the state must have been intended a return to dwell within its jurisdiction, and not to lurk in it as a place of concealment. *Fowler v. Bailey*, *supra*. To avoid the exception in the statute, the defendant is bound to show either that plaintiff knew of his return ("coming"), or that his return was so public as to amount to constructive notice or knowledge. *Little v. Blunt*, *supra*.

This is a case in which the defense has its origin in a perpetrated fraud. It is a fundamental rule of law that no defense can arise out of fraud and no defense can be sustained. Justice MILLER, of the United States supreme court, in a case not otherwise authoritative of this one well expresses this principle in these words, which have been cited with distinct approval by that court in *Upton v. McLaughlin*, 105 *U. S.* 640, and recently in *Rosenthal v. Walker*, 111 *U. S.* 191: "They (the Statutes of Limitations) were enacted to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud or by committing

Engle v. Fischer.

a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. *Bailey v. Glover*, 21 *Wall.* (U. S.) 349, and see *Poillon v. Lawrence*, 77 *N. Y.* 211.

C. E. Rushmore (W. & S. W. Fullerton, attorneys), for defendant-respondent.

The defendant having been in this state when the cause of action accrued, and having remained in it until the commencement of this action, a period of ten years, the statute of limitations has run against the claim.

That fraud which it is claimed was practiced by the defendant in concealing himself by a change of name, does not prevent the running of the statute. That fraud or concealment on the part of the debtor does not prevent the running of the statute in actions at law, is well settled in this state. The rule in the United States courts as administered in *Adams v. Stern*, 29 *Hun*, 280, seems to be different so far as the concealment of a cause of action is concerned. Judge DAVIS in deciding that case, put it upon the ground that "under the established rules of the United States courts, the question of a fraudulent concealment was a proper one to be submitted to the jury." No case can be found in this state where concealment of the debtor operated to take the case out of the statute and the contrary is expressly held. *Troup v. Smith*, 20 *Johns.* 32; *Allen v. Mille*, 17 *Wend.* 202; *Humbert v. The Rector, &c. of Trinity Church*, 24 *Wend.* 587; *Foot v. Farrington*, 41 *N. Y.* 164.

BY THE COURT.—VAN VORST, J.—The defendant, residing in Austria, in the month of May, 1873, in

Engle v. Fischer.

curred the obligation as acceptor of the draft which is the subject of this action. In July, 1873, the defendant absconded from Austria and came to the city of New York, and "for the purpose of concealing himself from his creditors assumed a fictitious name, and has ever since borne and been hiding under such fictitious name." The draft matured after the defendant took up his residence in New York. In April, 1882, the plaintiff, the owner of the draft, discovered defendant in the city of New York, living under his fictitious name, and demanded payment, which, being refused, he commenced this action.

Upon the trial the plaintiff's complaint was dismissed upon the ground that the action not having been commenced within six years after the cause thereof accrued, the same is barred by the statute of limitations.

The question arises whether the defendant was within the state during the period in question in the sense contemplated by the statute. It has been said that the statute of limitations "is a shield, and not a weapon of offense." I am quite sure that it was not designed to defeat justice. It should not shelter ['] a man who, designing to defeat the vigilance of his creditors, comes into this state and conceals himself under a fictitious name, thus doing all in his power to prevent his creditors from reaching and prosecuting him within the time limited. In the construction of statutes the judge is vested with authority to disregard the letter in order, in a given case, to ["] attain the ends of justice. This power has been repeatedly asserted and practiced upon the highest authority. (*Lieber's Hermeneutics* [3d ed.] note-page 285,* and cases cited.)

If this defendant is shielded by the strict letter of the statute, he is certainly not by its true spirit and intent. (*Code*, § 401.)

Engle v. Fischer.

In decisions with respect to the former statutes of limitations, the word "return," found in the section above cited, has been held to apply as well to a person coming from abroad, where he had resided, as to a citizen of this state going abroad for a time and then returning. (*Fowler v. Hunt*, 10 *Johns.* 464.)

It has also been decided that the return must not be clandestine and with the intent to defraud creditors. The "return" must be public and under such circumstances as to give the creditors an opportunity, by the use of ordinary diligence and due means, to prosecute the debtor. (*Cole v. Jessup*, 10 *N. Y.* 96, 103; *Randall v. Wilkins*, 4 *Denio*, 577; *Ford v. Babcock*, 2 *Sand.* 518; *Fowler v. Bailey*, 3 *Mass.* 201; *Little v. Blunt*, 33 *Id.* 359.)

A coming into this state with the design of continuing therein, concealed under a fictitious name to avoid the pursuit of creditors, is in legal effect no ['] coming at all until the day that he is discovered.

The construction contended for by the respondent would make this statute, which was designed to prevent fraud, "the means by which it is made successful and secure."

The case of *Poillon v. Lawrence* (77 *N. Y.* 207), which arose under the bankrupt law, has some analogy. In that case the bankrupt contracted a debt in one name, and obtained a discharge under a different name, designedly omitting in his proceedings reference to any fact which would disclose that he was the same person who was the debtor to the plaintiff. *RAPALLO, J.*, said: "It can hardly be supposed that any court would willingly sanction a fraud of that description."

Practically this defendant perpetrated a fraud equally obnoxious. Contracting a debt in a foreign country under his true name, he then comes to ['] this country and lives under an assumed name, in

Woodford v. Rasbach.

this way to conceal himself from his creditors. Under such circumstances he cannot claim the protection of the statute of limitations.

Troup v. Smith (20 Johns. 32), and other cases cited by respondent's counsel, involve the question of a ['] fraudulent concealment of the cause of action, but not of the person of the defendant; that is a wholly different question.

The judgment below is reversed and a new trial ordered, with costs to abide the event.

WOODFORD v. RASBACH.

WOODFORD v. CHAPMAN ET AL.

SUPREME COURT, OSWEGO COUNTY, SPECIAL TERM,
FEBRUARY, 1884.

§§ 1260, 3251.

Attorney.—Power of to settle and discontinue action and satisfy judgment.—Effect of settlement of action and satisfaction of judgment.—Report of referee on motion.

Although the opinion of a referee appointed on a motion is not conclusive to the court, it is entitled to respectful consideration.^[1]

Where an action has been settled and discontinued, and a judgment satisfied of record by the attorney for the plaintiff therein without authority there seems to be no doubt as to the power of the court upon motion to set aside the discontinuance and satisfaction, and substitute another attorney in the place of said attorney.^[2]

The attorney of record in an action by virtue of his retainer as such without the consent of his client, and without any new authority from him, may discontinue an action before judgment, and after judgment may satisfy the judgment itself, at any time within two years after filing the judgment-roll,^[3] but he can only do the first in such a manner as shall dispose of the action, without affecting his client's right to bring a new action for the same cause; and the

Woodford v. Rasbach.

second only upon the actual payment in money of the full amount of the judgment.^[4]

Where a stipulation for the discontinuance of an action executed by the attorneys of record, and an order discontinuing the action entered upon it professed in terms to rest upon a settlement of the case, — *Held*, that they would, so long as they were allowed to stand, be a bar to any other action brought for the same cause.^[5] Such a discontinuance and a certificate of the satisfaction of a judgment made on payment of a part only of the money due on the judgment, are not within the power of the attorney of record to execute, unless upon some special authority given by the client.^[6]

A certificate of the satisfaction of a judgment upon the payment of part thereof and a stipulation that an action be discontinued, resting in terms upon a settlement, both executed by the attorney of record, are as effective to discharge the plaintiff's claims as would be releases under seal, executed by him and the authority to execute them should, therefore, be as distinctly shown as that to execute for another, any sealed instrument.^[7]

Motion by plaintiff to set aside a certificate of satisfaction of the judgment recovered in the first action and a stipulation and order discontinuing the second action, and for an order removing the plaintiff's attorney of record in each action.

The first of the above entitled actions was begun in January, 1874, for malicious prosecution and false imprisonment. It was twice tried, at both of which the jury disagreed. A third trial in October, 1876, resulted in a verdict for the plaintiff for \$9,890, which, upon a motion upon the judge's minutes, was set aside and a new trial ordered. On the fourth trial, June 14, 1879, the plaintiff had a verdict for \$10,000. A motion for a new trial on the judge's minutes was denied, and on February 17, 1880, judgment was entered upon the verdict, including interest and costs for \$11,566.17. An appeal to the general term was taken from the judgment which was pending June 11, 1881. The second action was begun about May, 1879, and originally

Woodford v. Rasbach.

impleaded David H. Rasbach the defendant in the first suit, as a party defendant. On motion made after the second verdict in the first action, the complaint in the second action was dismissed as to David H. Rasbach, on the ground that the cause of action was the same in the two actions, and that the former action with the verdict recovered in it was a bar as to him to the second action; but the action was allowed to proceed against the other defendants. On the 11th day of June, 1881, this action was on the calendar for trial at the circuit to commence in Madison county June 13, 1881. Judgment was asked in this action for \$50,000 damages, John W. Boyle of Utica, was attorney of record, and J. I. Sayles of Rome, was counsel for the plaintiff in both actions.

On June 11, 1881, John W. Boyle, with the approval of J. I. Sayles, but without the presence or knowledge of the plaintiff, agreed with the defendants upon terms of settlement of both actions, to the effect, that upon the payment by them of \$10,000, and the assignment by them to the plaintiff, or to his attorney, of a judgment against the plaintiff and his father and brother for \$3,807.59, recovered August 30, 1873, and the withdrawal of specifications filed in the United States district court to prevent the discharge of the plaintiff in bankruptcy, the judgment in the first action shall be discharged and the second action discontinued. The defendants to carry the said settlement into effect, immediately, on the same day paid to John W. Boyle, the plaintiff's attorney, \$10,000 and also gave to him an assignment of the judgment against the plaintiff and his father and brother, and gave a stipulation withdrawing the specifications above referred to, filed in the United States district court. The plaintiff's attorney to carry said settlement into effect, also at the same time delivered to the defendant's attorney a satisfaction of the judgment against

Woodford v. Rasbach.

David H. Rasbach, executed and acknowledged by John W. Boyle as attorney for the plaintiff, and also a stipulation of discontinuance in the second action, which satisfaction and stipulation were on the same day filed by the defendants in Madison county clerk's office, and the said judgment against Rasbach discharged of record, and an order entered discontinuing the second action. None of the money or papers above referred to came to the hands of the plaintiff. The settlement itself was repudiated by him, and written notices to that effect were on or about June 16, 1881, served on the defendants and their attorneys, and soon after attorneys were employed by him to take steps to restore the said actions to their former conditions.

A motion was made in the first action to set aside the certificate of satisfaction filed, and the discharge of judgment entered thereon in Madison county. A motion was made in the second action to set aside the order of discontinuance entered in the action, and to restore it to its place on the circuit calendar. A part of the relief asked in each motion was that John W. Boyle be removed as attorney for the plaintiff and other attorneys substituted.

The motions were referred to a referee to take testimony and report the same with his opinion thereon to the court.

This has been done and the motions are now before the court upon his report and upon the original affidavits.

F. K. Fuller, for the plaintiff and motion.

The court has power, on motion, to set aside a satisfaction of judgment, or an order of discontinuance entered by fraud or mistake. *Wardwell v. Eden*, 2 *Johns. Cas.* 121, 258; *Mechanics' Bank v. Minthorn*, 19 *Johns.* 244; *Campbell v. Bristoll*, 19 *Wend.* 101-2; *Lewis v. Woodruff*, 15 *How. Pr.* 530; *Carstens v.*

Woodford v. Rasbach.

Branstorf, 11 *Abb. Pr. N. S.* 442; Rooney v. 2d Ave. R. R. Co., 18 *N. Y.* 368; McGregor v. Comstock, 28 *Id.* 237; Murray v. Gibson, 22 *Hun*, 386; Marshall v. Meech, 51 *N. Y.* 140; Hatch v. Central National Bank, 78 *Id.* 487.

An attorney is not authorized by his retainer to satisfy a judgment without full payment thereof in money, nor to compromise or release the same; nor can he settle a suit and conclude his client in relation to the subject in litigation without his client's consent. Mandeville v. Reynolds, 68 *N. Y.* 528-540; Beers v. Hendrickson, 45 *Id.* 665; Barrett v. Third Ave. R. R. Co., 45 *Id.* 628; Shaw v. Kidder, 2 *How. Pr.* 244; Quinn v. Lloyd, 5 *Abb. Pr. N. S.* 281; Lewis v. Woodruff, 15 *How. Pr.* 639, and cases cited; Carstens v. Barnstorf, 11 *Abb. Pr. N. S.* 442.

A party dealing with an attorney is bound to take notice of the scope of his authority as such. The attorney cannot compromise the claim of his client or release the cause of action, or satisfy a judgment in his client's favor without payment in the absence of special authority. There is no implication of an authority to do acts of this character, from his appointment as attorney in the case; and a party dealing with him is bound to take notice, that they are not within the scope of his authority. Cox v. N. Y. C. & H. R. R. Co., 63 *N. Y.* 414; reversing 4 *Hun*, 176; Benedict v. Smith, 10 *Page*, 126; Heyman v. Berenger, 1 *Abb. N. C.* 315; Doubleday v. Kress, 50 *N. Y.* 410, reversing 60 *Barb.* 161.

The plaintiff's attorney should be dismissed as attorney of record in both cases, and be adjudged not entitled to any compensation therein for his misconduct. Nor should Mr. Sayles have any compensation for like reason within the case of Chatfield v. Simmons, 92 *N. Y.* 209; Andrews v. Synge, 94 *Id.* 16.

Woodford v. Rasbach.

Boyle, Adams & Kernan, opposed.

CHURCHILL, J.—Two questions are presented here :

1. Is the relief desired properly sought by motion ?
2. If so, has the plaintiff shown himself entitled to it ?

The referee has found for the plaintiff on both of these questions, and though his opinion may ['] not be conclusive upon the court (*Marshall v. Meech*, 51 N. Y. 140), it is certainly entitled to respectful consideration.

There seems no question as to the power of the court at special term, to grant, upon motion, the ['] relief now sought. In many cases, the court has deemed it unwise to exercise the power and has left the parties to establish their supposed rights by action.

In *Conchlin v. Taylor* (68 N. Y. 221), the court of appeals approved an order of the special term, which vacated a satisfaction piece without prejudice to an action to affirm its validity.

The lapse of time, the intricacy of the facts and the necessity of bringing in parties other than the parties to the record in order to a proper determination of the questions involved, are reasons which have induced courts to leave parties in cases of this kind to an action.

These reasons do not seem to exist here, the settlement was promptly disaffirmed, and proceedings promptly taken to set it aside. There is but one question here—that of the authority of the plaintiff's attorney and counsel to settle these actions.

To the settlement of that question, neither the attorney, whose authority is denied ; nor the Canastota Bank, who are mere volunteers in their connection in the matter, are necessary or proper parties. Every circumstance necessary to be presented to uphold the settlement, can be fully presented through the defend-

Woodford v. Rasbach.

ants in these actions, without additional parties. There seems no good reasons why these matters may not be determined upon motion.

The attorney of record, by virtue of his retainer as such without the consent of his client, and with-
['] out any new authority from him, may discontinue an action before judgment; and after judgment may satisfy and discharge the judgment itself, at any time within two years after filing the judgment-roll (*Gillard v. Smart*, 6 *Cow.* 385; *Barrett v. 3d Ave. R. R. Co.*, 45 *N. Y.* 628-636; *Code*, § 1260, 2 *R. S.* 362, § 24), but he can only do the first in such a manner as shall dispose of the action without affecting his client's right of action or right to bring a new action for
['] the same cause; and the second only upon the actual payment in money of the full amount of the judgment. *Cox v. N. Y. C. R. R.*, 63 *N. Y.* 414-419; *Barrett v. 3d Ave. R. R.*, 45 *Id.* 628-635; *Beers v. Hendrickson*, 45 *Id.* 665-670; *Gardard v. Smart*, 6 *Cow.* 385.

In one of these cases the stipulation of discontinuance executed by the attorney of record and the order entered upon it profess in terms to rest upon a
['] settlement of the case and would therefore, so long as they are allowed to stand, be a bar to any other action brought for the same cause.

In the other case the certificate of satisfaction by virtue of which the judgment has been discharged of record, was given by the attorney of record upon the payment to him of a part only of the money due upon the judgment.

Neither instrument was, therefore, within his power to execute as attorney of record, and if
['] sustained, must be so upon some special authority given by his client.

The instruments executed in these cases, if allowed to stand, are as effective to discharge the plaintiff

Woodford v. Rasbach.

iffs claims as would have been releases under seal ['] executed by him (*Beers v. Henderson*, 45 *N. Y.* 665).

The authority to execute them should, therefore, be as distinctly shown as that to execute for another any sealed instrument.

Mr Sayles, the counsel of the plaintiff, whose right to settle these cases was affirmed, perhaps in stronger terms than that of the attorney of record, did not assume for himself to have authority to execute any instrument which should release the plaintiff's claims.

The referee to whom these motions were sent has found that the certificate of satisfaction of the judgment and the stipulation of discontinuance of the action were executed without authority from the plaintiff; in this I think his report warranted by the evidence. If they are without authority, the discharge of the judgment upon the record and the order of discontinuance entered are also without authority, and with them should be set aside. It seems quite obvious that the parties to this settlement, on both sides, acted in good faith.

The cause of action in these two actions had been adjudicated to be the same and that cause of action had been twice valued by a jury—once at \$9,890, and again at \$10,000.

It was the right of the defendants at any time, to pay the judgment for ten thousand dollars and costs, entered in the first action, and thereupon compel a discontinuance of the second action upon the payment of the costs of that action. The amount received by plaintiff's attorney was \$10,000 in money, with an assignment of a judgment against the plaintiff and his father and brother for \$3,807.59 and interest, from August 30, 1873 (amounting to nearly \$6,000), and the withdrawal of opposition to the plaintiff's discharge

Woodford v. Rasbach.

in bankruptcy. The amount insisted upon and received upon the one side, and the amount paid on the other, seems to establish that the defendants believed Messrs. Boyle & Sayles authorized to settle, and that each party acted in good faith in the settlement.

The defendants, having acted in good faith, should have the right to test, by action, if they so desire, the authority of plaintiff's attorney and counsel to agree upon terms of settlement which would bind the plaintiff. An order should therefore be made setting aside the satisfaction and discontinuance above referred to, and directing the return, by plaintiff's attorney, to the defendants, of the money and other matters received by him as a consideration for the same, but without prejudice to any action that may be brought by the defendants, or either of them, for the purpose above indicated.

The present relations of the plaintiff and his attorney, Mr. Boyle, as shown by the proceedings on these motions, are such that it would not be proper that the latter should continue to act as attorney for the former in these actions. But the attorney has a lien upon the cause of action and the papers in his hands which he has not forfeited, and which must be satisfied or secured before he can be required to surrender his place as attorney. If the plaintiff and Mr. Boyle can agree as to the amount of the latter's lien, upon paying it, the plaintiff will have a right to substitute other attorneys. In the absence of such agreement, the order may require that upon the giving of a bond by plaintiff to the attorney in an adequate sum (and \$3,000 would seem to be such sum), conditioned for the payment of any judgment which may be recovered by the latter against the former for his charges, services and disbursements in the above entitled actions, and in matters connected with them, or either of them, the attorney be required to surrender the papers and the management of these

Goettling v. Biehler.

actions to such attorneys as the plaintiff may designate, and that an order be entered substituting such attorneys for the present attorney of record.

Ten dollars costs of each motion, with necessary disbursements for referee's fees, to be paid by the defendants. 68 N. Y. 221-224;* Code, § 3251.

GOETTLING, APPELLANT, v. BIEHLER, ET AL., RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
MAY, 1884.

§§ 993, 1023.

Findings.—How disposed of by court before which action tried.—Effect of failure to make, because considered unnecessary.

The provision of the Code (§ 1023) which requires the court or referee before whom a cause is tried, at or before the time when the decision is rendered, to note upon the margin of the statement of facts, etc., which he has been requested to find the manner in which each proposition has been disposed of, and either file or return to the attorney the statement so noted is mandatory in its language, and no authority has been given to disregard it when the proposition may be considered not to be either important or material. The party is entitled to have each proposition of fact or law acted upon and noted, and it is only after that has been done that the materiality of either is to be regularly considered.

Where one of the parties to an action tried before the court without a jury, before the decision thereof requested the court to make certain findings of fact and law which the court refused to do on the ground that they were unnecessary,—*Held*, that this was not the disposition of them which in any possible view of the case the court was authorized to make; that an appeal from the judgment entered on the decision of the court was not in a condition to be heard until such findings were passed upon, and for that purpose

* Concklin v. Taylor.

Goettling v. Biehler.

they should be returned to the justice before whom the trial took place, and the decision of the appeal suspended until the propositions should be considered and separately noted.

James v. Cowing (82 N. Y. 449), followed.

(Decided October, 1884.)

Appeal of judgment recovered on trial at special term.

The opinion states sufficient facts.

Hyland & Zabriskie, for appellant.

D. S. Riddle, for respondent.

DANIELS, J.—Before the decision of this action by the court before which the trial took place, the findings of fact and law were presented and submitted to the court, and the court refused to find either of them because they were considered unnecessary.

That was not the disposition of them, which, in any possible view of the case the court was authorized to make, for by section 1023 of the Code of Civil Procedure it has been provided and directed that the court shall, at or before the time when the decision is rendered, note on the margin of the statement the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement so noted. This provision is mandatory in its language, and no authority has been given to disregard it when the propositions may be considered not to be either important or material. The party is entitled to have each proposition of fact or law acted upon and noted, and it is only after that has been done that the materiality of either is to be regularly considered.

This is the clear intention and effect of this part of the Code, and it has so been regarded in *James v. Cowing* (82 N. Y. 449). Until that shall have been done, this appeal is not in a condition to be heard.

In re Powers.

A practice somewhat similar existed before this section went into effect. And when it was not followed it was considered to be proper to send the case back to have the proposition submitted, passed upon and noted (*Bigler v. Pinkney*, 80 *N. Y.* 636).

The decision of the points presented by the appeal should be suspended until these propositions shall be considered and separately noted, and to have that done, they should for that purpose be returned to and disposed of by the learned justice before whom the trial took place.

DAVIS, P. J., and BRADY, J., concurred.

IN RE THOMAS POWERS, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, NOVEMBER, 1884.

§ 2615.

Probate of will.—When aliens should be cited to attend.

Where among the surviving next of kin of a decedent who was a citizen of the United States and died intestate, were a brother and a sister, both non-resident aliens :—*Held*, that such brother and sister were entitled to the same interest in the decedent real estate as they would have taken were they citizens of the United States ; that the interest of the brother was subject to be defeated by the state, and only by the state, upon his failure to file an affirmation or deposition respecting his intended citizenship in the manner provided in *Laws of 1845*, chap. 115, § 1, and that both such brother and sister must be cited to attend the probate of the will.

(Decided December 10, 1884.)

Ex parte application for citations to attend probate of the will of Thomas Powers, deceased.

In re Powers.

The fact sufficiently appear from the opinion.

William A. Haggerty, for the proponent and motion.

Is it necessary on such probate to cite the non-resident alien brother and sister of said decedent ?

The statutes in relation to this subject are *Laws of* 1845, chap. 115 ; amended by *Laws of* 1874, chap. 261, and *Laws of* 1875, chap. 38 ; 1 *R. S.* part II., chap. 1, tit. 1, §§ 8, 15, 16, 17 ; *Code of Civil Procedure*, § 2615.

The title of the act of 1845 is "an act to enable resident aliens to hold and convey real estate and for other purposes." The use of the word *resident* in the title would seem to exclude any intention of conferring any rights upon *non-resident* aliens. See section 4 of this act as it was last amended in 1875 (ch. 38). Non-resident aliens are not, and cannot be, heirs of a resident of the United States. An alien cannot take lands by descent nor transmit them to others as his heirs. 1 *Washburn on Real Property*, marg. p. 49, § 23. Every citizen of the United States is capable of holding lands within this state and of taking the same by descent devise or purchase. 1 *R. S.* part. II., chap. 1, tit. 1, § 8. The provision as to declaration of intention, &c., contained in section 15 (1 *R. S.*, part II., chap. 1, tit. 1) and referred to in section 1 of the act of 1845, applies only to *resident* aliens ["any alien who has come or may hereafter come into the United States"] and enables them to *take* and hold only *after* such declaration, &c., is made. *Id.* § 16. "Such alien shall not be capable of taking or holding any lands or real estate which may have *descended* or been devised or conveyed to him previously to his having become such resident and made such deposition or affirmation as aforesaid." *Id.* § 17. The rule of descent contained in 1 *R. S.*, part. II., chap. 2 must be limited by section 8, above quoted, as to persons qualified to *take* by *descent*.

In re Powers.

"The following persons must be cited upon a petition presented as prescribed in the last section.

"1. If the will relates exclusively to real property, the husband, if any, and all the heirs of the testator." *Code Civ. Pro.* § 2615.

The will here relates exclusively to real estate. As would appear from the statutes and decisions above cited, the non-resident alien brother and sister of the deceased are not heirs. It will be noticed that the Code says that the "heirs" must be cited, but does not say "persons answering the description of heirs." The statute is learnedly considered in *Hall v. Hall*, 81 *N. Y.* 130; *Luhrs v. Eimer*, 80 *N. Y.* 171; and *Goodrich v. Russell*, 42 *N. Y.* 85; to which cases I would respectfully call the court's attention.

ROLLINS, S.—The decedent, who at the time of his death was a citizen of the United States, owning real estate in this county, died here in July last. Among his surviving next of kin are a sister and a brother, both non-resident aliens. A paper purporting to be his last will, and to devise to his wife and to a brother residing in the United States certain real property, having been offered for probate, the question has arisen as to the necessity of issuing citations to his alien brother and sister.

Section 2615 of the Code of Civil Procedure directs that upon an application for the probate of a will affecting real estate, all the "heirs" of the testator must be cited. Are the alien brother and sister of this decedent to be deemed his "heirs" within the meaning of this section? "An heir," says Blackstone, "is he upon whom the law casts the estate immediately on the death of the ancestor." (2 *Blackst. Comm.* chap. 14, p. 201.) At common law aliens were incapable of taking by descent, and they were formerly under the same incapacity in the state of New York. (2 *Kent's Comm.* 53; *Lynch v. Clarke*, 1 *Sand. Ch.* 604.) This

In re Powers.

disability was removed by the act of 1845. That act (§ 4, chap. 115, *Laws of 1845*, as amended by chap. 261, *Laws of 1874*, and by chap. 38, *Laws of 1875* [3 *R. S.* 7th ed. 2170]), recognizes the right of alien kin of a person deceased, who was at the time of his death a resident alien or a citizen of the United States, to take, *as his heirs*, the lands which would have descended to them in that capacity had they been citizens of the United States. The title of an alien male of full age is however made defeasible by the state upon his failure to file an affirmation or deposition respecting his intended citizenship in manner provided by section 1 of the act. That, under the provisions of this statute, non-resident aliens can take by descent seems too plain to be doubted, and has been often expressly asserted by our courts. (*Goodrich v. Russell*, 42 *N. Y.* 85; *Luhrs v. Eimer*, 80 *N. Y.* 171; *Hall v. Hall*, 81 *N. Y.* 130.)

I hold, therefore, that this decedent's sister, though a non-resident alien, is entitled, if he shall be found to have died intestate, to the same interest in his real estate that she could take were she a citizen of the United States, and that his alien brother is entitled to a like interest, subject to be defeated by the state and only by the state, in case he should neglect to make and file the deposition and affirmation that the statute requires.

Both the brother and sister must therefore be cited.

Hayes v. Davidson.

HAYES, AS ASSIGNEE, &C., OF GRANT FOR BENEFIT
OF CREDITORS, APPELLANT, v. DAVIDSON,
SHERIFF OF THE CITY AND COUNTY
OF NEW YORK, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, OCTOBER, 1884.

§ 531.

*Bill of particulars.—When ordered in action by assignee against sheriff
for conversion.*

In an action by an assignee for the benefit of creditors against a sheriff for taking personal property under an attachment against the assignor, and converting it, the sheriff is not entitled to a bill of particulars of the items of the stock of goods so seized and converted, [1, 3] but where a part of the goods were returned to the plaintiff after the commencement of the action and accepted by him, he should be required to furnish a bill of particulars of the goods so returned. [2] BRADY, J. (dissenting).—*Held*, that the plaintiff should furnish a statement in writing of the property alleged to have been carried away and converted by the defendant, together with a statement of the alleged value of such article, piece or portion of the property so alleged to have been taken. [4, 5]

(Decided October 7, 1884.)

Appeal from an order requiring the plaintiff to serve on the defendant a bill of particulars.

The opinion states the facts.

Peter Condon, for plaintiff, appellant.

W. Bourke Cockran, for defendant, respondent.

DAVIS, P. J.—Ordinarily I should be of opinion that a sheriff who is sued for taking on process a

Hayes v. Davidson.

stock of goods from the possession of an assignee, [1] and removing them from his possession is not entitled, when sued by such assignee, to demand a bill of particulars of the items of the stock of goods so seized and taken. Presumptively his possession of them would be held sufficient to give him full knowledge of what they consist, and a better opportunity to know their items than the assignee in trust from whom they have been taken. In this case a part of the stock was sold by the sheriff, and another part returned by consent to the assignee. Reasonable diligence would of course have enabled the sheriff to know what part and how much of the stock was sold, and as to that part he should be in better position to know the particulars than the assignee can be presumed to be. But as to the items returned to the assignee, if such return were in gross of a remaining bulk, the assignee who received them ought to be in better position to know the items than the sheriff. Upon the facts appearing in the affidavits I think the order ought to be so modified as to limit the bill [2] of particulars to the items returned to the plaintiff, so that the sheriff may be relieved from the necessity of proving those items as part of his defense and his liability in respect thereof be limited to such damages as the taking, withholding and returning with acceptance by plaintiff subject him.

With this modification the order should be affirmed, without cost of this appeal to either party.

DANIELS, J.—[Concurring.]—I am convinced that the modified directions suggested in the opinion of the presiding justice is as broad as the facts of the case will justify. There would be neither injustice nor inconvenience produced by an entire denial of the [3] motion; for the sheriff must have known the goods, and of what they consisted, which he

Hayes v. Davidson.

seized, and also those which were sold by him, and excluding them, would as clearly indicate the articles returned. But as the plaintiff has the ability to furnish a statement of the articles returned, and that will remove all possible ground for misunderstanding concerning the subject of the controversy, he may well be required to do that. And to such a direction I therefore agree.

BRADY, J.—[Dissenting.]—This action is brought to recover damages for the wrongful conversion by the defendant of certain personal property which was part of the estate of Duncan A. Grant, and claimed by the plaintiff as the substituted assignee of Grant.

The taking of the goods is admitted. They appear to have been seized by the defendant, as sheriff, under certain warrants of attachment issued against Grant, upon the ground that he had assigned and disposed of his property with the intent to defraud his creditors. Some of the goods seized were sold, and it appears that about three weeks after the commencement of the suit for the conversion of the stock taken from Grant the merchandise which was not disposed of was returned by the sheriff to the plaintiff and accepted by him. Upon the application of the defendant an order was made directing the plaintiff to furnish a statement in writing of the goods, chattels, fixtures and other personal property alleged to have been carried away and converted by the defendant, together with a statement of the alleged value of each article, piece or portion of the property so alleged to have been taken, and that in default of such an account the plaintiff should be precluded from giving evidence on the trial of the alleged conversion of the property mentioned in the complaint or the value thereof.

The defendant is a public officer, and the conver-

Andrews v. Snyder.

sion charged against him was an act which he was called upon to perform by virtue of the various warrants of attachment issued. The allegation in the complaint is that between January 4th 1884, and February 25th following, the defendant, as sheriff, willfully and wrongfully seized, took and carried away and converted to his own use certain goods and merchandise, the property of the estate of Grant and belonging to the plaintiff as assignee. But this is too general an allegation in an action like this, and [°] the court below was justified in directing the order which was made in the exercise of its discretion, and it cannot be interfered with under the circumstances revealed by the papers submitted on this appeal.

The order should therefore be affirmed, with \$10 costs and the disbursements of the appeal.

ANDREWS, RESPONDENT, v. SNYDER, APPELLANT.

COUNTY COURT OF ONONDAGA COUNTY, NOVEMBER,
1884.

§§ 3046, 3048.

Appeal from justice's court.—Mode of service of notice of appeal.

Service of a notice of appeal from a judgment rendered in a justice's court upon the attorney who appeared for the respondent in the justice's court, is of no avail if the respondent is a resident of the county in which the judgment was recovered, and an order permitting the appellant to so serve the notice of appeal would be of no effect, as the statute prescribes when such service may be made and an order could not enlarge or limit the scope of the statute.

Where a notice of appeal from a judgment of a justice's court was

Andrews v. Snyder.

duly served on the justice and the fees and costs paid him, and an undertaking to stay execution given and a copy of the notice of appeal served on the respondent's attorney who served notice of appearance, and the appellant relying upon such appearance placed the cause on the calendar, noticed it for trial, and upon, its being reached on the day calendar took a dismissal of the complaint by default and entered judgment for costs, and the respondent moved to set aside the notice of appeal and all proceedings subsequent thereto on the ground that it had not been served on him, and it appeared that he was at the time of the appeal and had been, ever since, a resident of the county in which the judgment was recovered, —*Held*, that such motion should be granted, but that the appellant should be allowed to serve his notice of appeal upon the respondent, and that costs should not be allowed either party.

(Decided November 8, 1884.)

Motion by respondent for an order setting aside and dismissing the appeal herein; the undertaking on appeal; an order permitting service of the notice of appeal on the respondent's attorney; the order of this court dismissing his complaint and the judgment entered thereon.

This case was tried before a justice of the peace of Onondaga county and a jury on May 2, 1884, and judgment rendered for the plaintiff and against the defendant for \$110 damages and \$13.12 costs.

On May 8, the appellant gave an undertaking and served notice of appeal on the justice, and paid to him the cost of trial, &c.

On May 22, 1884, the appellant, not being able to find respondent within the county of Onondaga, procured an order allowing him to serve the notice of appeal on the attorney, who appeared for the respondent on the trial of the case in justice's court, and did so serve it. Subsequently said attorney served on appellant's attorneys a notice of motion to set aside the appeal on the ground that the service of the notice of appeal was irregular, in that it did not comply with section 3048

Andrews v. Snyder.

of the Code of Civil Procedure. Thereafter said motion was withdrawn and notice of appearance served on appellant's attorney by respondent's attorney. The case was upon the calendar of the court several terms following. At the October term the case was regularly noticed for trial, placed upon day calendar, and, there being no appearance, on the part of respondent on motion of appellant the complaint was dismissed with costs against respondent and judgment was duly entered against him on October 21, 1884, for \$102.89.

Other facts are stated in the opinion.

William M. Ross, for plaintiff-respondent and motion.

Chamberlain & Ayers, for defendant-appellant, opposed.

NORTHROP, J.—Upon the papers in this case I must hold as a matter of fact that the respondent was at the time of the appeal and ever since has been a resident of Onondaga county; that the appellant's attorneys seasonably and in good faith served the notice of appeal upon the justice but omitted, through mistake as to the facts, to serve it upon the respondent; that the attorney who appeared for the respondent in justice's court has appeared in this court for him, acted as such attorney and that the appellant's attorney has in entire good faith relied upon such appearance in this action.

It is unnecessary to determine whether the notice of appeal was personally served on respondent's attorney or not, as such service, if made while respondent was a resident of Onondaga county, would have been of no avail.

I must hold on these facts that the appeal has not been fully perfected.

Kent v. Popham.

The order permitting personal service of notice of appeal on respondent's attorney in justice's court was of no effect. The statute prescribes when such service may be made, and an order could not enlarge or limit the scope of this statute.

It follows that the order permitting service of notice, &c. upon the attorney who appeared for the respondent in the justice's court must be set aside; that the order dismissing the complaint be vacated and that the judgment against the respondent be vacated and set aside.

Under section 3049, Code of Civil Procedure permission ought to be and is given, to serve upon respondent the notice of appeal within ten days or if unable to do so to serve under section 3048, subd. 2.

Upon all the facts this does not seem to be a case where costs should be allowed either party.

KENT, RESPONDENT v. POPIAM, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1884.

§§ 1498, 1632.

Action to foreclose mortgage.—Proper parties to.

A plaintiff should not be allowed to amend his complaint on the trial of the action by striking out all the allegations referring to one of the defendants so as virtually to discontinue the action as to him except upon the payment of all costs in the action whether awarded to him on appeal from a former judgment or otherwise. [1]

So far as mere legal rights are concerned, the only proper parties to an action for the foreclosure of a mortgage are the mortgagor or mortgagee and those who have acquired rights under them subsequent to the mortgage; [2, 3] and one who claims a lien on the mortgaged

Kent v. Popham.

property prior to the mortgage and adverse to the mortgagor cannot be made a party for the purpose of trying the validity of his claim. [3, 4]

Where in an action to foreclose a mortgage a judgment creditor of the grantor of the mortgagor, was made a party, for the purpose of having the judgment declared subsequent and subordinated to the mortgage, and the judgment creditor claimed that his judgment was a lien on the mortgaged premises superior to the mortgage,—*Held*, that he could not be made a party to the action for that purpose; [3, 4] that an amendment of the complaint which struck out the allegations referring to him and his judgment and in effect dismissed the action as to him could not be allowed except upon payment of all costs, [1] and could not in any manner affect his rights because it left his lien existing against the property whatsoever it might be and subject to the enforcement of which the purchaser must take the property. [5]

(Decided, March, 1884.)

Appeal from an order amending the complaint herein and from the judgment thereafter entered.

S. J. & F. H. Cowdrey, for defendant-appellant.

E. H. Benn, for plaintiff-respondent.

BRADY, J.—This action was brought ostensibly to foreclose a mortgage made by Henry C. Barretto to the plaintiff, to secure the bond executed by Frank J. Barretto and himself. The complaint, in addition to the allegations in reference to a foreclosure of the mortgage, alleges as follows:

“And this plaintiff further shows that the defendant, Francis J. Barretto, was, on or about the 1st day of August, 1872, seized in fee simply of an undivided one-tenth of certain lands at Barretto’s Point (then Westchester county) now City of New York, of which the lands covered by the mortgage hereinabove described constituted a portion; that on said 1st day of August, 1872, said Francis J. Barretto conveyed to Henry C. Barretto his said undivided interest in said

Kent v. Popham.

lands, by an instrument in writing, under seal, bearing date, duly executed and delivered on said 1st day of August, 1872; that said conveyance was made for and in consideration of the indorsement by said Henry C. Barretto of a certain promissory note for \$25,000 made by said Francis J. Barretto, dated on or about August 2, 1872, and then delivered to plaintiff, and to secure the said Henry against the payment of the same; that relying upon the said note and indorsement and the said conveyance to said Henry, the plaintiff did pay, lay out and expend for, and loan and advance to the said Francis J. Barretto at various times thereafter, during the year 1872, large sums of money, which amounted over and above all payments and offsets to \$13,000; that thereafter and actual partition of said lands was had, and the lands covered by the mortgage mentioned and described herein were duly set apart and then conveyed to Henry C. Barretto, in right of the said Francis J. Barretto, and in confirmation of the conveyance of August 1, 1872, whereupon the mortgage mentioned herein was given by the said Henry C. Barretto to secure the moneys so loaned and advanced, and paid out by plaintiff to the defendant, Francis J. Barretto, which moneys still remain unpaid, and in pursuance of the agreements and covenants of the said parties; that the conveyance from Francis J. Barretto, although delivered on or about August 2, 1872, was not recorded until October 23, 1873, in the afternoon, in Westchester county register's office, liber 857 of Conveyances, page 114, and a certain judgment obtained in the New York supreme court, by defendant William H. Popham against the defendant Francis J. Barretto, for \$11,550.47, was docketed in the clerk's office of said county, on said October 23, 1878, in the forenoon.

"And plaintiff alleges that, by reason of the facts

Kent v. Popham.

hereinabove set forth, the lien of the said judgment was subsequent and subordinate to the lien of the said conveyance from Frank J. Barretto to Henry C. Barretto, and to plaintiff's mortgage, and may be so declared and decreed." And in connection with these allegations the following prayer for relief: "That the lien of the said judgment obtained by the defendant, Popham, may be declared to be subsequent and subordinate to the lien of the plaintiff's mortgage." The answer of the defendant Popham's testators controverted the material statements of the complaint and alleged fraud in the pretended conveyance from Francis J. Barretto to Henry C. Barretto and the complicity of the plaintiff therein; denied the delivery of the conveyance prior to the docketing of his judgment; claimed priority of lien; set up his adverse title; and claimed the benefit of his allegations as though he had demurred.

It appears that after the opening of the case at the trial a motion was made on behalf of the defendant Mrs. Popham—the action having been continued against her as executrix of William H. Popham her husband and the judgment creditor—to dismiss the complaint as against her; which was denied and an exception duly taken. It appears that this motion was renewed after the plaintiff rested, and was again denied and an exception taken. It also appears that during the trial and after the plaintiff had introduced evidence of the deed, bond and mortgage, a motion was made by the plaintiff to amend the complaint. The motion was opposed, but the order was granted and an exception taken. This is the third appeal in this case. On a former appeal the judgment was reversed and a new trial awarded with costs to the appellant to abide the event. Subsequently an order was made granting leave to the plaintiff to make the

Kent v. Popham.

amendments which were allowed upon the trial, and the order appealed from was reversed.

The questions presented upon this appeal arise first upon the propriety of permitting the amendments to be made on the terms that were imposed, and secondly the judgment itself against the defendant Popham. The amendments allowed changed the entire character of the action by striking out the allegations cited and part of the prayer for relief, also cited and converted it into one of foreclosure only, resting upon the judgment and not seeking by any allegations in the complaint to settle the status in reference to the priority of the judgment, which was referred to in the allegations of the complaint stricken out. And that such was the design of the amendments is clear from the fact that the prayer in regard to the judgment was also stricken out as part of the complaint. The character of the action having been thus changed and all the allegations stricken out making the defendant

Popham a party and presenting issues as to him, ['] it was virtually a discontinuance of the action as to him, and should not have been allowed except upon the payment of all the costs in the action, whether awarded to him on appeal or otherwise. There does not seem to be the slightest doubt about the propriety of this result and of our conclusions arrived at on this appeal, that the judgment against the defendant Popham should be reversed.

It is settled that the only proper parties to a ['] bill of foreclosure so far as mere legal rights are concerned, are the mortgagor or mortgagee and those who have acquired rights under them *subsequent* to the mortgage. And this rule is founded upon the statute (*Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127). It was said in that case: "The plaintiff may make prior incumbrancers parties, for the purpose of having the amount ascertained and

Kent v. Popham.

paid out of the proceeds." But, as said in that case and to be said in this, no such purpose was indicated by the complaint. On the trial the allegations presented a contest as to whether the judgment mentioned was a prior lien to the mortgage.

In *Corning v. Smith* (6 *N. Y.* 82), it was held ['] by the court of appeals that where one claims adversely to the title of the mortgagor and prior to the mortgage, he cannot be made a party defendant in a bill to foreclose a mortgage for the purpose of trying the validity of such claim. And in *Eagle Fire Ins. Co. v. Lent* (6 *Paige*, 635) the chancellor declared the rule emphatically to be, that so far as mere legal rights were concerned upon a bill of foreclosure, ['] the only proper parties to the suit are the mortgagor and mortgagee and those who have acquired rights and interest under them subsequent to the mortgage; and further that the mortgagee had no right to make one who claimed adversely to the title of the mortgagor and prior to the mortgage, a party defendant for the purpose of trying the validity of his adverse claim of title in this court. See also *Frost v. Koon* (30 *N. Y.* 428), in which these cases have been referred to, commented upon and sustained.

It was doubtless the knowledge of this rule which induced the appellant's counsel to apply for the amendment which was granted upon the trial, ['] and by which his action was converted into one of simple foreclosure. The defendant's rights could not be affected in any way by the amendment having been allowed, because that left his lien existing against the property whatsoever it may be and subject to the enforcement of which the purchaser must take the property. In proceedings to collect the judgment its priority could be determined, if any issue were taken on that subject.

For these reasons the order allowing the amend-

In re Boynton, &c. Co.

ment should be modified so as to require the payment of all the costs in the action to the defendant Popham, either given to her or to her testator to abide the event, or which occurred in the ordinary way, and the judgment should be so modified as to make it appear distinctly that no rights of the defendant Popham are affected except as a subsequent incumbrancer, for which purpose she was a proper party. No costs of this appeal to either party.

DANIELS, J., concurred.

DAVIS, P. J. [Concurring.]—I concur except as to the costs of this appeal. I see no reason why this should not be granted. The action of the plaintiff below has compelled the executrix to take this appeal. Why should the estate bear its expenses?

IN RE THE E. M. BOYNTON SAW & FILE COMPANY.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM, SEPTEMBER, 1884.

§§ 1810, 2419 *et seq.*

Voluntary dissolution of corporation.—Power of court in proceedings for.

—Appointment of receiver.—Contents of report of referee.—

Decision of court.

A proceeding for the voluntary dissolution of a corporation is a purely statutory one in which the court has no power or authority to act, except as such power is conferred by statute. [1]

A receiver cannot be appointed in a proceeding for the voluntary dissolution of a corporation until the granting of the final order dissolving the corporation. [2, 3, 5]

In re Boynton, &c. Co.

Where in a proceeding for the voluntary dissolution of a corporation on the return of the order to show cause why it should not be dissolved, a referee was appointed by the court "to take proof of the insolvency of the corporation and of all matters relating thereto." —*Held*, that the court had power to do so, but that the report of the referee or decision of the court must contain a statement of the effects, credits and other property, and of the debts and other engagements of the corporation and of all matters pertaining to its affairs, [6] and that where neither the report nor the decision of the court contained such a statement the final order was void and must be reversed and the proceedings remitted to the special term to proceed anew on the referee's report. [3]

In re Eagle Iron Works (8 Paige, 385); [4] *In re Pyrolusite Manganese Co.* (3 N. Y. Cir. Pro. 270), [7] followed.
(Decided December 9, 1884.)

Appeal from an order dissolving the corporation respondent; appointing a permanent receiver of its property and denying a motion to vacate order appointing a temporary receiver.

On October 29, 1883, on a petition of a majority of the trustees of the E. M. Boynton Saw and File Company asking for its dissolution on the ground that it was insolvent and that such course was beneficial to the interests of its stockholders, and on affidavits two orders to show cause were granted herein; one why the corporation should not be dissolved, and the other why a receiver should not be appointed, to preserve its property, pending a final order for its dissolution and a distribution of its assets.

On November 2, 1883, the papers having been duly served on the attorney general, an order was entered appointing Wallace P. Groom as such receiver, to take, keep and preserve the property of the corporation.

On November 5, 1883, the receiver's bond was approved and filed, and he entered upon the discharge of his duties. Subsequent to this date, the National

In re Boynton, &c. Co.

City Bank of New York, Charles E. Bishop and the Waterbury M'fg Co., obtained judgments against the company and issued executions therein to the sheriff under which formal levies were made on the property of the company.

Thereafter motions to set aside the order appointing the temporary receiver were made, and at the conclusion of the argument a reference was ordered "to take proof of the insolvency of the corporation and all matters relating thereto." Thereafter the referee's report was filed, and the order appealed from made. Further facts are set out in the opinion.

John B. Whiting (Gibson, Whiting & Parkin, attorneys), for the National City Bank of New York, appellant.

The order appointing the temporary receiver is void and should be vacated because the court had no power to make such an order. If there is power in the court to appoint a temporary receiver in proceedings for voluntary dissolution, it must arise from some new provision of the Code of Civil Procedure; there was no such power under the revised statutes. *Chamberlain v. Rochester S. P. V. Co.*, 7 *Hun*, 557. A creditor who obtains a levy under an execution on the personal property of the corporation after the petition for voluntary dissolution is filed, but before the final hearing has a valid lien and one that must be respected by the permanent receiver. *Matter of Waterbury*, 8 *Paige*, 380; *Matter of French M'fg Co.*, 12 *Hun*, 488. . . . The court has no power to appoint temporary receivers in these proceedings. *Matter of Open Board of Brokers*, 3 *N. Y. Monthly Law Bulletin*, 57; *Smith v. Danzig*, 3 *N. Y. Civ. Pro.* 127. . . . This proceeding is strictly statutory and must conform to the requirements of the statute. *Sharp v. Speir*, 4 *Hill*, 76; *Matter of Hoff*, 72 *N. Y.* 184.

In re Boynton, &c. Co.

Charles E. Chase, for F. W. Gade, a stockholder, appellant.

The court had no jurisdiction to make an order of dissolution because the petition and schedules do not comply with the requirements of section 2421. There must be a strict compliance with all the statutory requirements to give jurisdiction. *In re Pyrolusite Manganese Co.*, 3 *N. Y. Civ. Pro.* 270; *Chamberlain v. Rochester S. P. V. Co.*, 7 *Hun*, 557; *Matter of Westchester Iron Co.*, 15 *How. Pr.* 7. . . . The order appointing the temporary receiver was made without jurisdiction. . . . No receiver can be appointed except under sections 2429, and 1810. The former section confers authority of appointment only upon dissolution of the corporation. The latter is not a source of power of appointment but simply limits the power of appointment in proceedings for dissolution to the court. *Matter of Open Board of Brokers*, 3 *N. Y. Monthly Law Bul.* 57. . . . This is not a case in which a temporary receiver may be appointed. *Chamberlain v. Rochester S. P. V. Co.*, 7 *Hun*, 557; *Matter of Edson*, 1 *N. Y. Monthly Law Bul.* 51.

Charles H. Luscomb, for receiver and trustees, respondents.

As to power of court to appoint temporary receiver, cited Code of Civil Procedure, § 1810, subd. 4; *U. S. Trust Co. v. N. Y. W. S. & B. R. R. Co.*, 6 *N. Y. Civ. Pro.* 90; *Attorney General v. Continental Life Ins. Co.*, 28 *Hun*, 360.

BROWN, J.—This a purely statutory proceeding, and the court has no power or authority to act, except as such power is conferred by the statute. The authority for the appointment of a receiver is given by section 2429 of the Code, and this

In re Boynton, &c. Co.

can only be exercised upon granting the final order dissolving the corporation. There was no power in the court therefore to appoint a temporary receiver, and the order of November 2, 1883, was void. This view of the statute is in harmony with the decision of the courts. (Matter of French Mfg Co., 12 *Hun*, 488; Chamberlain v. Rochester S. P. V. Co., 7 *Id.* 557; *In re* Open Board of Brokers, 3 *N. Y. Monthly Law Bul.* 57.)

The statute does not give the court control over the corporate property until the decision is made upon the return of the order to show cause. If such control had been given there would doubtless be, as an incident to such control, authority of restrain creditors from suing the company and to prevent any interference by creditors with the corporate assets. (*Phoenix Foundry Co. v. N. R. Cons. Co.*, 4th Dept., 6 *N. Y. Civ. Pro.* 160.)

But in the case of the Eagle Iron Works (8 *Paige*, 385), the chancellor held that an injunction would not be granted in such a proceeding as the one we are considering, and said: "The statute has not given to the court any control over the property until the coming in of the master's report and the dissolution of the corporation." He pointed out the difference between a proceeding for a voluntary dissolution of the corporation, and proceedings against corporations in equity, and held that in the former case creditors who by their diligence obtained a lien upon the corporate property could not be deprived of the preference they had acquired; while in the latter case the court might interfere by injunction to restrain the creditors' proceedings.

I think, therefore, the order appointing the temporary receiver was void, and should have been vacated.

In re Boynton, &c. Co.

Another point is made by the appellant which I think is fatal to the proceedings. Upon the hearing upon the order to show cause, the court referred the matter to a referee "to take proof of the insolvency of the corporation and all matters relating thereto." This the court had power to do, and the Code provides, section 2426, that the report of the referee [7] or decision of the court "must contain a statement of the effects, credits and other property, and of the debts and other engagements of the corporation and of other matters pertaining to its affairs." The referee returned the testimony to the court, but made no report upon any of the matters mentioned in the statute, and there does not appear in the appeal papers to have been any decision of the court, except that contained in the final order. This, however, makes no mention of the matters required by the statute.

In the case of the Pyrolusite Manganese Company (3 *N. Y. Civ. Pro.* 270), for a voluntary dissolution, a similar defect was held to be fatal to the proceeding. The requirement of the Code was one of substance and not of form, and a failure to comply with it renders the final order void.

The order appealed from must therefore be [8] reversed with costs, and the proceedings remitted to the special term to proceed anew upon the referee's report in the manner required by the statute.

BARNARD and DYKMAN, JJ., concurred.

Heenan v. New York, &c. R. R. Co.

HEENAN v. THE NEW YORK, WEST SHORE &
BUFFALO RAILROAD COMPANY.

COUNTY COURT OF ALBANY COUNTY, DECEMBER, 1884.

§§ 341, 488, 499.

County Courts.—*Jurisdiction of, of actions against domestic corporations.*
—*Objection to, how raised.*—*Instance of case in which want of*
jurisdiction did not appear on face of complaint.

The general rule that for the purpose of ascertaining the place of venue of an action against a railroad corporation any county in which it operates its road, may be regarded as its residence, does not apply to county courts; [¹,²] but in them for the purpose of determining their jurisdiction a domestic corporation, or joint stock association, whose principal place of business is within the county is deemed a resident thereof.[²]

A county court has not jurisdiction of an action against a domestic corporation unless its principal office is located within the county and personal service of the summons is made within the county upon one of those officers of it whom the Code of Civil Procedure provides may be served with a summons in an action against it.[²,³]

Where the fact that a county court had not jurisdiction of a defendant does not appear on the face of the complaint, he does not waive the objection by appearing generally and serving an answer, pleading among other defenses the want of jurisdiction; [⁵] under the Code a defendant may plead as many defenses as he has, whether, as formerly denominated, to the jurisdiction, in abatement or in bar.[⁶]

Where the complaint in an action in the county court of Albany county against a domestic railway corporation, alleged that the defendant was a domestic corporation engaged in the business of carrying freight and passengers for hire in various parts of the State including the county of Albany and that a part of the line of its road was located in that county.—*Held*, that the allegations of the complaint as to residence were sufficient,[⁵] and the defendant could not demur thereto,[⁵] and did not waive its objections to the jurisdiction by appearing generally and serving an answer averring that

Heenan v. New York, &c. R. R. Co.

its principal place of business was in the city of New York and never was established or located in the county of Albany, and that the summons was served upon it in the city of New York; [⁵,⁶] that such allegations of the answer being true the court had not jurisdiction of the defendant. [⁴]

(Decided December, 1884.)

Motion by defendant for a new trial and that the complaint be dismissed.

The opinion states the facts.

Ira K. Place, for defendant and motion.

B. R. Heyward, for plaintiff, opposed.

NOTT, County Judge.—This is an action to recover damages for injury to personal property caused by defendant's negligence in operating its railroad through the village of West Troy, in this county. The case was tried and submitted to the jury, which rendered a verdict for the plaintiff. The defendant now moves for a new trial, and that the complaint herein be dismissed. Two questions are presented for the consideration of the court—first, whether this court has such jurisdiction as to entertain the action; and second, if it has not, has the defendant waived, or is it concluded from raising the point. The complaint alleges that the defendant is a domestic corporation under our laws, and is engaged in the business of carrying freight and passengers for hire in various parts of the State, including the county of Albany, and that a part of its line of road is located in this county. The answer of the defendant admits that it is a domestic corporation, and avers that its principal place of business is and was at and long before the commencement of this action established by its articles of association and actually located in the city of New York; that its principal place of business never was established or

Heenan v. New York, &c. R. R. Co.

located in the county of Albany, and that the summons was served upon defendant in the city of New York. It also puts in issue the various allegations in the complaint. On the trial it was established that the defendant, being a railroad corporation, operated its road through various counties of this State, including Albany county, and that by the articles of association, and in fact, its principal place of business is and was located in the city of New York, and that the summons herein was served upon one of the officers of the defendant in the city of New York.

Corporations created under the laws of this [1] State are residents of the State, and an examination of the adjudications of our courts will show, that their residence may be localized into one county or exist in many counties at the same time. For the purpose of ascertaining the place of venue in an action in the supreme court against a railroad company, any county in which it operates its road may be regarded as its residence (*Pond v. H. R. R. Co.*, 17 *How. Pr.* 543). So with reference to an action in the justices' court (*Belden v. N. Y. & H. R. R. Co.*, 15 *How. Pr.* 17; *Sherwood v. S. & W. R. R. Co.*, 15 *Barb.* 652). So with regard to highway labor (*People ex rel. H. R. R. R. Co. v. Pierce*, 31 *Barb.* 138). So for the purposes of taxation (*People v. Fredericks*, 48 *Barb.* 173; *S. C. aff'd*, 48 *N. Y.* 70). If there was no special provision in regard to the county court, these authorities would control us and we should hold the action could be maintained against the defendant in this county.

The Code of Civil Procedure provides that for [2] the purpose of determining the jurisdiction of the county court, a domestic corporation or joint stock association whose principal place of business is established by or pursuant to a statute or by its articles of association or is actually located within the county, is deemed a resident of the county, and personal service

Heenan v. New York, &c. R. R. Co.

of a summons made within the county, as prescribed by the Code, is sufficient (§ 341). Our jurisdiction, [2] therefore, by this provision, in the case of a domestic corporation, depends first, upon the location within our county of its principal place of business, whether by force of a special statute or its articles of association, or its actual location; and secondly, personal service of the summons within the county upon one of those of its officers who may be served under the Code of Civil Procedure with a summons in an action against it.

The provisions of the constitution in reference to the county court (art. 6, § 15) are broad enough to permit the legislature to confer this power upon the county court, in the cases of corporations doing business in the county, and that it is so is eminently proper to cover cases where large business enterprises are carried on within the county, and some of its chief officers within the county directing its important offices, although the principal office may be located in another county (*Gemp v. Pratt*, 7 *Daly*, 197, distinguishing *Landers v. The S. I. R. R. Co.*, 53 *N. Y.* 450).

Here the principal place of business of the defendant, by its articles of association and in fact, [4] is located within New York county, and the summons was not served in this county. The conclusion reached is that this court has not jurisdiction over the defendant.

This brings us to the consideration of the second question: has the defendant waived, or is it concluded from raising the objection? The plaintiff insists that the defendant having answered and appeared generally in the action, although by its answer it raised the issue of its residence, it cannot now say that it is a non-resident of the county, as the court could acquire jurisdiction of the defendant by the service of the summons upon a proper officer of the company within the

Heenan v. New York, &c. R. R. Co.

county, which could not be done in the case of an individual.

I am of opinion that the allegations of the [°] complaint as to residence were sufficient, and as the defect of which the defendant complains did not appear on the face of the complaint, he could not demur (*Code*, § 488.) The objection to the jurisdiction was therefore properly taken by answer (*Code*, § 498, *Holbrook v. Baker*, 16 *Hun*, 176 ; *Mayhew v. Robinson*, 10 *How. Pr.* 162-5), and was not waived by appearance in the action and an answer therein setting up the objection (*Sullivan v. Frazer*, 4 *Robt.* 620 ; *Wheelock v. Lee*, 74 *N. Y.* 497-8).

In opposition to the rule at common law, under [°] the Code, a defendant may plead as many defenses as he has, whether, as formerly denominated, to the jurisdiction in abatement or in bar. (*Code*, § 507 ; *Sweet v. Tuttle*, 14 *N. Y.* 465.) It follows, therefore, that the general appearance of the defendant, distinctly by its pleading giving notice of its intention to raise the question of jurisdiction, is no waiver, nor does it conclude the defendant from insisting on the want of jurisdiction of this court. (*Landers v. The S. I. R. R. Co.*, 53 *N. Y.* 450 ; *Dauidsburgh v. The K. L. Ins. Co.*, 90 *N. Y.* 526.) The cases cited by the plaintiff's counsel (*Paulding v. Hudson Man. Co.*, 2 *E. D. Smith*, 38 ; *Ballard v. Burrows*, 2 *Robt.* 206 ; *Olcott v. Maclean*, 73 *N. Y.* 223) do not apply to this case.

An order must be entered granting the motion of the defendant and awarding a new trial ; and the complaint should be dismissed.

Thomas v. Utica, &c. R. R. Co.

THOMAS ET AL. AS ADMINISTRATORS, ETC., v. THE
UTICA & BLACK RIVER RAILROAD
COMPANY.SUPREME COURT, ONONDAGA COUNTY CIRCUIT,
FEBRUARY, 1884.

§§ 1902, 1903.

Action for causing death.—Measure of damages in.

In an action for causing death by negligence, etc., the question to be decided by the jury in determining the amount of damages, is: what was the reasonable expectation of pecuniary benefit to the next of kin, etc., by inheritance or otherwise from the continuance in life of the deceased, worth in money? If the requirements of the statute in other respects are satisfied the plaintiff is entitled to recover at least nominal damages and the fact that the result of the deceased surviving the casualty which caused his death was subject to chance, is no reason for holding as a matter of law that plaintiff could not recover any damages at all or only nominal damages.

(Decided February, 1884.)

Motion by defendant under section 999 of the Code of Civil Procedure for a new trial on the minutes. Also motion by plaintiff for an extra allowance.

E. D. Mathews, for plaintiffs.*A. M. Beardsly*, for defendant.

VANN, J.—In this action brought to recover damages from the defendant for negligently causing the death of the plaintiff's intestate, the plaintiff had a verdict for \$3,100, the main question presented for decision upon this motion for a new trial relates to the measure of damages adopted by the court in its charge to the jury.

Thomas v. Utica, &c. R. R. Co.

The deceased was 51 years of age, unmarried, in fair health, temperate, prudent and industrious. He had accumulated \$5,000 worth of property and the evidence warranted the jury in finding that he was still earning and accumulating when he died.

His expectation of life, according to the tables in common use by insurers of lives, was twenty and twenty-one one-hundredth years.

He died intestate leaving him surviving only brothers and sisters, and children of deceased brothers and sisters.

It was not shown that any one of these persons had received from him any pecuniary benefit during his lifetime.

The court submitted to the jury the following question upon the subject of damages :

“What was the reasonable expectation of pecuniary benefit to the next of kin by inheritance or otherwise, from the continuance in life of the deceased, worth in money ?”

The defendant excepted and now contends that the plaintiffs were entitled at the most to only nominal, but really to no damages, even if their case was fully made out so far as the questions relating to negligence are concerned.

A right of action for causing death by negligence is given by section 1902, of the Code of Civil Procedure.

By force of the statute some damages may be recovered by the executor or administrator of a decedent who has left him or her surviving a husband, wife or next of kin, for a wrongful act neglect or default causing death, &c.

By holding otherwise, courts would decide that the legislature had created a barren cause of action. A right of action, which is simply a right to recover, with no possibility of a recovery is an absurdity. At

Thomas v. Utica, &c. R. R. Co.

least nominal damages must therefore be awarded if the statute is satisfied in other respects.

Section 1903 of the Code provides that the damages recovered in such an action are exclusively for the benefit of the husband, wife and next of kin, and are to be distributed as unbequeathed assets.

The next section (1904) provides that the damages awarded may be such a sum, not exceeding \$5,000, as the jury deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death, to the person or persons for whose benefit the action is brought.

In any case the estimate of damages must, to a certain extent, depend upon probabilities, as death is the cause of damages, continuance in life must be the basis of damages. But as life is uncertain, it cannot be proved how long a decedent would have lived if he had not been killed; therefore the probability of his surviving for a longer or shorter period must be considered in every case. Moreover, the doctrine of probabilities must extend further and include other elements that may enter into the question of damage.

It may be difficult to say in the case under consideration that the continuance in life of the intestate would have been of pecuniary benefit to the next of kin, but it is impossible to say that it would not have been of substantial pecuniary benefit to them. Therefore, they may have sustained a serious pecuniary loss by his death; there was some chance about it. But, as no logical verdict can be rendered for damages from the death of a human being, under this statute, except upon a calculation of chances, the question must constantly arise, "what were the probabilities?" In the clearest case there is at least the chance that if the deceased had survived the accident he would have died from some other cause in a very short time.

Other elements of chance enter into most cases,—

Thomas v. Utica, &c. R. R. Co.

such as health, ability to labor or support, and the like. In the case at bar the learned counsel for the defendant has suggested an unusual number of chances, one or more of which, however, must apply to every case arising under the statute. Because the result was subject to chance, therefore, is no reason for holding as matter of law that the plaintiffs were not entitled to recover any damages at all, or only nominal damages. The question in all these cases must be, what were the chances worth in money to the next of kin under all the circumstances? What were the probabilities worth? What was the reasonable expectation of pecuniary benefit worth?

This was substantially the question that the jury was told to answer in this case. It was sent to the jury upon the theory of reasonable expectation, or in other words, probabilities. That theory was adopted without much time for reflection; but, even now, after studying the question with some care, aided by the researches and arguments of counsel, I am unable to improve upon it. Upon a second trial, with my present light upon the subject, I should feel compelled to ask the jury in effect to answer the same question.

Other grounds of error are assigned by the defendant, but I have not considered them, as I think that the general term should pass upon the measure of damages, before a second trial is had, if one is necessary.

The motion for a new trial is denied, with \$10 costs. The motion for an extra allowance is denied without costs. There may be a stay of proceeding for sixty days after entry of judgment to enable the defendant to prepare a case and exceptions.

Oakes v. Harway.

OAKES, INDIVIDUALLY AND AS EXECUTOR, ETC. v.
HARWAY.CITY COURT OF NEW YORK, SPECIAL TERM,
DECEMBER, 1884.

§ 3174.

City court of New York.—Counter-claim in action in, brought by executor.

Where, in an action in the city court of New York brought by one suing individually and as executor and trustee under a will for moneys loaned the defendant by a firm composed of the plaintiff individually and the plaintiff as executor, etc., the defendant pleaded as a counter-claim a demand for moneys alleged to be due the defendant under an agreement made with the plaintiffs under such firm name,—*Held*, that if the plaintiff was authorized to conduct business and contract in said name and was authorized to sue thereon, it is subject to the right of counter-claim.

(Decided December 19, 1884.)

Demurrer to a counter-claim set up in an answer.

The plaintiff sues individually and as executor and trustee under the last will and testament of Eliza Oakes, deceased, to recover \$950 and interest, moneys alleged to have been loaned the defendant by the "plaintiffs." The complaint contained the following allegation, to wit:

"1st. That at the times hereinafter mentioned said plaintiffs Francis J. Oakes individually, and said Francis J. Oakes as the executor and trustee under the last will and testament of Eliza Oakes, deceased, were doing business together in the city of New York as copartners under the firm name of Oakes & Co.;" and then sets out the loan.

Oakes v. Harway.

The defendant's answer (omitting the formal parts) was as follows :

“ *First.* As a defense to this action and as a counter-claim to the demand of the plaintiffs in said complaint alleged, this defendant alleges, that heretofore and on or about the 1st day of January, 1884, the plaintiffs, in their firm name of Oakes & Co., executed and delivered to this defendant a certain agreement in writing bearing date on that day, wherein and whereby said plaintiffs in and by said firm name of Oakes & Co., promised and agreed to pay in monthly payments to this defendant one fifth of all profits on all sales of dye woods, and dye wood extracts, paste and liquors of whatever name or nature made by said plaintiffs for the term of five years from the date of said agreement; that said plaintiffs have since the execution and delivery of said agreement sold large quantities of dye woods and dye wood extracts, paste and liquors made by said plaintiffs, upon which they have made large profits; that this defendant has often applied to, and demanded of said plaintiffs an account and statement of such sales by them since the date of said agreement, and that they pay to this defendant the amount of one fifth of the profits thereon according to their said agreement, but they have neglected and refused to make such account or statement, and to pay over the said one fifth of the profits thereon to this defendant. That this defendant has no information of the precise amount of profits upon said dye woods and dye wood extracts, paste and liquors, made by said plaintiffs, and he has not had, and has not now, any means of ascertaining the precise amount of such profits, and cannot ascertain the same precisely, and particularly, without inspection and examination of plaintiff's books of account, but upon information and belief he avers that the said one-fifth of the profits aforesaid, now due to this defendant from said

Oakes v. Harway.

plaintiffs amounts in the aggregate to a sum far exceeding the amount claimed in the complaint herein, and for which judgment is demanded therein, and amounts to the sum of at least \$2,000.

“Wherefore this defendant demands that the plaintiffs herein be required to account to him for the said one-fifth of the profits upon said articles mentioned in said agreement according to the terms of said agreement, and that he recover such sum as may be found due to him, as a counter-claim in this action to the extent of \$2,000, and that out of the amount of such sum found due to him, the amount of the claim of the plaintiffs herein be deducted and allowed, and that he have judgment for the balance thereof, with his costs in this action.”

To the counter-claim set up in this answer the plaintiff demurred on the ground that the “court has not jurisdiction of the subject thereof, the alleged counter-claim being of such a nature that this court has no jurisdiction of an action thereupon.”

George Hill, for plaintiffs and demurrer.

Theodore N. Melvin (*Melvin & Steckler*, attorneys), for defendant, opposed.

McADAM, Ch. J.—The plaintiff individually, and as executor, &c. of Eliza Oakes, does business under the name of Oakes & Co., and in that name lent the defendant \$1,950, of which \$950 is claimed to be due. The defendant by not denying admits the plaintiffs' cause of action, and pleads by way of counter-claim, the breach of a contract made by the plaintiffs in said firm name, and in like capacity, on which the defendant has suffered \$2,000 damages. If the plaintiff is authorized to conduct business and contract in the name alleged, and is authorized to sue thereon, it is subject to

Pruden v. Tallman.

the right of counter-claim and authorized by the Code. Section 3174 does not militate against this construction, for it expressly provides "that in an action brought by an executor or administrator *any* counter-claim may be interposed, which could be interposed in a like action brought in the supreme court." The counter-claim pleaded here could have been pleaded in a like action brought in the supreme court, and is therefore properly pleaded here. The policy of the law is, that where a party brings suit, and voluntarily brings himself within the jurisdiction of a court, he must settle the controversy there, and cannot complain that the power to do even justice is limited. This rule has its exceptions, of course, but the present case does not furnish one of them. It follows that the defendant must have judgment on the demurrer, with leave, however, to the plaintiff to withdraw the demurrer, and reply to the counter-claim within six days on payment of ten dollars cost.

PRUDEN AND ANOTHER v. TALLMAN.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, JANUARY, 1885.

§§ 867-869, 2432 *et seq.*

Supplementary proceedings.—Mode of compelling production of books, etc. on examination in.

A witness or party in proceedings supplementary to execution may be required to produce books, papers, etc., by a subpoena *duces tecum*, or by an order.

(Decided January 10, 1885.)

Pruden v. Tallman.

Motion to set aside an order of a referee in proceedings supplementary to execution requiring the judgment debtor to produce certain books.

The plaintiff as judgment creditor procured an order for the examination of the defendant in proceedings supplementary to execution, before A. H. Berriek, referee. After the defendant's examination had been commenced the following order was made by the referee :

“Adjournment to Wednesday, December 31st, at 2 P. M., at which time I direct said Darius Tallman to appear for further examination, and to bring with him the books of account of his business herein testified, and bring the books testified to.”

The defendant thereupon served notice upon the plaintiff's attorney that he would “make a motion before one of the justices of this court at a special term thereof,” “for an order of this court overruling the direction of said referee, that the defendant herein produce before said referee at his examination in said proceedings his books of account, and for such other or further order as to the court shall seem proper in the premises,” and on the day named in the notice made this motion.

Stephen A. Walker, for judgment debtor and motion.

Edgar J. Phillips, for judgment creditor, opposed.

J. F. DALY, J.—A witness may be required by subpoena *duces tecum* to produce papers on an examination in supplementary proceedings (*Champlin v. Stoddard*, 17 *N. Y. Weekly Dig.* 76), and of course a party may be.*

* The following decision applies the same rule to a case in which the witness was a corporation.

Pruden v. Tallman.

That being the case, an order may be made for the production of books, &c. under sections 867-869, instead of resorting to a subpœna. The order may be made by the referee before whom the examination is had, under the two sections cited. Motion denied.

HOLMES, BOOTH & HAYDEN v. STIETZ.

CITY COURT OF NEW YORK, CHAMBERS, OCTOBER, 1884.

§§ 867-869, 2432 *et seq.*, 2444.

Supplementary proceedings.—Compelling production of books of corporation, called as a witness in.

A corporation called as a witness in proceedings supplementary to execution may be compelled to produce its books either by order or by subpœna *duces tecum*.

(Decided October 25, 1884.)

Motion to vacate an order requiring the president of a corporation called as a witness in supplementary proceedings to produce its books.

On the examination of the defendant, in proceedings supplementary to execution it appeared that he was the president and superintendent of the Otto Stietz N. Y. Glass Letter Co. Thereupon the proceedings were adjourned and he was ordered individually and as president and superintendent of said company to produce certain books and papers of the company to be used on such examination. Whereupon this motion was made.

E. P. Wilder, for the judgment debtor and motion.

Thomas H. Barowsky, for the plaintiff, opposed.

HAWES, J.—The defendant claims that a corporation, called as a witness in a supplementary proceeding, cannot be compelled to produce its books either by order or subpœna *duces tecum*. There seems to be no question but what this could be done upon a trial, for whatever may have been the previous rulings in this State upon that question, it is expressly allowed by § 868 of the Code, and a corporation although not a party to the action, is brought within the same category as a natural person. I fail to discover any valid reason why the statute does not apply to a hearing in a special proceeding. It is to all intents and purposes a trial, so far as the taking of testimony is concerned, and § 2444 of the Code expressly declares that either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as upon the trial of an action. I have

Keeler v. McNeirney.

KEELER v. MCNEIRNEY.

SUPREME COURT, ONONDAGA COUNTY, SPECIAL TERM,
MAY, 1883.

§§ 447, 1498.

Action to foreclose mortgage.—Question which cannot be tried in.

In an action to foreclose a mortgage where a defendant claims title paramount to the mortgagee under a deed executed before, but recorded after the making and recording of the mortgage in suit, the court can not determine whether or not the mortgagee was a purchaser in good faith and for a valuable consideration, for the purpose of deciding which of the parties had precedence under the recording act; the rights of the parties under the recording acts are legal rights triable in the forum where legal rights are triable and not at special term, and the title which passes to a purchaser on foreclosure does not include rights paramount to the title of the mortgagor or mortgagee at the date of the mortgage.

Emigrant Industrial Savings Bank v. Goldman (75 N. Y. 127); *Payn v. Grant* (23 Hun, 134), followed; *Brown v. Volkening* (64 N. Y. 76), distinguished.

(Decided May 4, 1883.)

no doubt that §§ 868 and 869, which are new, were designed to meet such a case as is now presented, and the attempted distinction which is sought to be made between an action and a special proceeding has no foundation in fact.

The right to compel the production of the books of a corporation when it is not a party to an action is valid under the statute, and the proceedings of the plaintiff in that behalf are regular. The case of *Wertheim v. The Continental Railway Co.* (3 N. Y. Civ. Pro. 371, U. S. Circuit Court), holds that it is a right at common law, but I do not deem it necessary to consider that phrase of the case, inasmuch as I am of opinion that the Code has expressly granted the power. Although it may be added that if such a right did exist at common law, there could be no pretence of an argument that the statute, by using the word "trial," intentionally restricted it to the trial of an action. Section 2444 of the Code, however, expressly negatives any such distinction and grants to a party in that respect all the rights which he would have upon the trial of an action.

Motion to vacate the order is denied.

Keeler v. McNeirney.

Action to foreclose a mortgage on real property.

The opinion states the facts.

D. B. Keeler, plaintiff in person.

Geo. N. Kennedy and *M. F. Sherlock*, for defendants.

MERWIN, J.—The plaintiff seeks to foreclose a mortgage given October 20, 1871, by James A. O'Hara, to Charles C. Gustin for \$435.60 recorded same day and assigned November 10, 1876, to the plaintiff, the assignment not being recorded. The complaint is in the ordinary form and alleges that the defendants McNeirney and O'Riley, have or claim some interest in or lien upon the mortgaged premises, which interest or lien, if any, has accrued subsequently to the mortgage. There is no special allegation as to the character of the interest of those defendants.

Those defendants answer and deny the mortgage and assignment, and allege that said premises were on April 27, 1871, for a valuable consideration duly conveyed by said O'Hara by warranty deed to Bishop Conroy, who on September 25, 1878, for valuable consideration by quit-claim deed, duly conveyed them to the defendant McNeirney, that Bishop Conroy went into possession at the date of the deed to him and so remained till he conveyed to McNeirney; and the latter then went into possession and has since so remained; and that the said mortgagee and plaintiff had full notice of said conveyances.

It appeared on the trial that the deed to Conroy was recorded September 23, 1872, being after the giving and recording of the mortgage, so that the real question between the parties is which has precedence under the recording acts, and that depends upon whether the mortgagee was a purchaser in good faith and for a valuable consideration (3 *R. S.* 7 ed. 2215). The point is taken by the defendant, that the question cannot be

Keeler v. McNierney.

determined in this action it being brought simply for the foreclosure of the mortgage.

In *Emigrant Ind. Savings Bank v. Goldman* (75 *N. Y.* 127) and in *Payn v. Grant* (23 *Hun*, 134), it was in effect decided that legal rights accruing prior to the mortgage were not cut off by a foreclosure, and this too although the parties holding such prior rights were made parties defendant with the usual allegation (9 *N. Y.* 502,* 64 *N. Y.* 77). The rights of parties under the recording act are legal rights and triable in the forum where legal rights are triable. They are not triable at special term unless the parties consent; that consent does not exist in the present case. Had the complaint set out the facts in regard to this question and claimed its adjudication here, the complaint would have been demurrable (2 *Barb.* 20;† 75 *N. Y.* 132‡). The statute prescribes what title shall pass to a purchaser on foreclosure (3 *R. S.* 6 ed. 199, § 102; Code Civ. Pro. § 1632) and does not embrace interests which are paramount to the title of the mortgagor and mortgagee at the date of the mortgage (75 *N. Y.* 132;§ 9 *N. Y.* 502§).

If the opinion of Judge ALLEN in *Brown v. Volkening* (64 *N. Y.* 76), is deemed an authority in the light of the subsequent cases, it may be said that in that case equitable not legal rights were involved; this being the situation, I think that I have no right to determine in this action, whether or not the mortgagee was a purchaser in good faith and for a valuable consideration. It does not follow, I think, that the complaint should be dismissed as to the defendant McNierney. He may have rights subsequent to the mortgagee, and if so as to those the foreclosure should

* *Lewis v. Smith.*† *Holcomb v. Holcomb.*‡ *Emigrant's Ind. Savings Bank v. Goldman.*§ *Lewis v. Smith.*

 Smith v. Fogarty.

be operative, and it can be so only by his remaining a party defendant. This is the logic of the case of *Frost v. Koon* (30 *N. Y.* 428, 443). This decree, however, should contain a special provision that any rights of these defendants, prior to the mortgages, should not be deemed to be in any way affected by the foreclosure. The defendants who defend are not in my opinion entitled to costs. It is at least probable their rights would have been fully protected without answer, and besides, they unnecessarily put at issue the existence of the mortgage and assignment. The plaintiff is entitled to a judgment of foreclosure in the usual form, adding, however, a separate provision as above suggested.

SMITH ET AL. v. FOGARTY.

CITY COURT OF NEW YORK, SPECIAL TERM, SEPTEMBER, 1884.

§§ 435, 436, 437, 636, 1216.

Attachment.—When affidavit on which granted insufficient.—Substituted service of summons.—When time to answer expires.—When order for set aside.—Proof on entry of judgment on.

Where the affidavit upon which an attachment was issued stated as the ground for issuing the attachment "that the defendant has sold and mortgaged a portion of or all of his property for the purpose and with the intent to cheat and defraud his creditors and particularly the plaintiffs . . . ; that deponent was informed and verily believes that the defendant is largely in debt; and that the defendant keeps himself concealed, as deponent believes, with the intent to hinder, delay and defraud his creditors and with the intent of evading service of process," and that a notice had appeared in the *Herald* of August 8, that the defendant was missing since "last Tuesday," with a description of his person, and no other facts or statements were set forth, showing fraud.—*Ibid.*, that the affidavit was insufficient and the attachment should be set aside.

Smith v. Fogarty.

If substituted service of a summons is ordered when the place where the defendant can be found is known to the plaintiff, the proceedings are irregular and the order should be set aside.

A defendant, upon whom substituted service of a summons is made, is not in default until the expiration of six days after the filing of an affidavit showing service according to the order.

By section 437 of the Code of Civil Procedure, substituted service of a summons is assimilated to that by publication, and application to the court and the same kinds of proofs are necessary in cases of substituted service as where the service is by publication.

(Decided September 8, 1884.)

Motion to vacate attachment and set aside order for substituted service, and judgment entered on such service.

Henry M. Goldfogle, for defendant and motion.

Hugh Reavy, for plaintiff, opposed.

BROWN, J.—Motion to vacate warrant of attachment. Order for substituted service of the summons, and the judgment entered against the defendant upon such service.

The questions will be taken up in their order.

The affidavit upon which the attachment was granted sets forth a cause of action and that there is a sum due to plaintiff over and above all counter-claims. The following statements are set forth as constituting the grounds for the issuing of the attachment, to wit: "that defendant has sold and mortgaged a portion of or all of his property for the purpose and with the intent to cheat and defraud his creditors and particularly the plaintiff, and by reason thereof the plaintiff was so cheated and defrauded out of the sum above mentioned. That deponent was informed and verily believes that the defendant is largely in debt. That the defendant keeps himself

Smith v. Fogarty.

concealed, as deponent believes, with the intent to hinder delay and defraud his creditors, and with the intent of evading services of process."

It then recites that a notice appeared in the *Herald* of August 8, that Richard Fogarty, of Ninty-ninth street and Third avenue, was missing since Tuesday, with a description of his person.

Diligent creditors are entitled to the remedies provided by law for their protection against the acts of fraudulent debtors, and where the facts and circumstances presented to a court or judge are such, that the intent to defraud appears to be a fair and logical sequence from the facts shown, the protection will be extended and maintained, but there must exist and be shown by affidavit, this intent to defraud or to delay creditors, before the debtor's property will be seized in advance of the creditor's establishment of his right to a judgment against his debtor. In the case at bar no facts or circumstances are shown entitling the plaintiff to the warrant. The affidavit contains but general allegations, that the defendant was guilty of the various acts stated in the Code as ground for the granting of the warrant, and using almost the identical language of the Code. None of the statements have even the virtue of positiveness to commend them; that as to sale or mortgaging of defendant's property being in the alternative, while the other statements are upon the information and belief, or belief alone, of the affiant; neither the source of information nor the grounds of belief are given. I might multiply reasons and cite innumerable authorities showing the viciousness of the affidavit and its insufficiency to maintain the attachment in this case; one or two, illustrating the principle, I think, will answer. In *Yates v. North*, 44 *N. Y.* 271, it was held that "a general statement that a fraudulent disposition of defendant's property had been made is in-

Smith v. Fogarty.

sufficient. The facts must be stated from which the legal conclusion of fraud must flow." In *Ellison v. Bernstein*, 60 *How. Pr.* 145, the belief of a party is of no weight. The intent to defraud must be the fair and logical sequence of the facts shown.

This affidavit is not even supported when opportunity is given to do so upon a hearing upon the merits; no additional proof is offered from which the intent, either of fraudulent disposition can be drawn, or of concealment with intent to avoid service of process at the time the warrant was applied for.

On the contrary, the proof offered tends to repel the existence of such intent, either of concealment or fraudulent disposition, rather than establish it. The deputy sheriff who levied the attachment swears he found defendant's wife in possession of both stores, when he made his levy. The business thereat was conducted in the usual way. The defendant swears he never sold or disposed of his property except in his usual course of business, and defendant explains that his absence from the city was caused by a visit, undertaken while in a partial state of intoxication, to some relatives in Savannah, without previous deliberation, and without informing his wife. Upon his arrival at Savannah he wrote to his wife informing her of his whereabouts; in the meantime she carried on his business in the usual methods, paid plaintiffs \$100 on account of their claim, and informed plaintiff, after receipt of the letter, of the whereabouts of her husband. They first attached his goods and then telegraphed to him to come home. He leaves his friends and arrives in this city a few days thereafter.

I fail to discover in these facts the intent to defraud, or of concealment with intent to delay creditors. The warrant of attachment cannot be sustained.

It is unnecessary to consider the questions raised

Smith v. Fogarty.

upon formality or sufficiency of the levy under the attachment.

The affidavits upon which the order for substituted service was granted, were *prima facie* sufficient to authorizing the granting of the order. But the plaintiffs purposely or otherwise concealed from the justice who granted the order the fact that the place of sojourn of the defendant was known to them. Section 435 Code permits the order to be made, when proper and diligent effort has been made to serve the summons upon the defendant, and *that the place of his sojourn cannot be ascertained*. The application for the order was made on the 16th of August. The plaintiffs were informed by defendant's wife about August 9th of defendant's place of sojourn at Savannah; on the 14th, at least not later than the 15th of August, and a day before the order was applied for, the plaintiffs telegraphed to the defendant at Savannah to return to New York. The plaintiffs had knowledge, at the time the order was applied for, of the exact spot where defendant could be found. If substituted service is ordered when residence of defendant without the State is known, the proceedings are irregular (*Collins v. Campfield*, 9 *How. Pr.* 519; *Jones v. Derby*, 1 *Abb. Pr.* 458; *Foot v. Harris*, 2 *Id.* 454; *Collins v. Ryan*, 32 *Barb.* 647).

For the reasons stated, the order for substituted service will be set aside.

Assuming, however, that the order for substituted service is good, the judgment entered thereon is irregular.

The effect of provisions of sections 437 is to make the service described in the order of substituted service assimilate to that of service by publication. The result is that the defendant on whom such service is made is not in default until the expiration of six days after the filing of an affidavit, showing service accord-

Krom v. Kursheedt.

ing to the order. The affidavit of service in this case was filed on August 23, and judgment entered the same day. This was premature (16 *Hun*, 625*).

The assimilation of proceedings in cases of substituted service to that of service by publication also extends to the proofs necessary to be taken before judgment can be regularly entered. Section 1216 provides that "where service is made upon a defendant . . . otherwise than personally and he is in default, the plaintiff may apply to the court for the judgment demanded in the complaint." It also recites the proofs required before judgment can be entered.

The plaintiff neglected compliance with these essential prerequisites to the entry of his judgment, but proceeded to enter judgment as for default of appearance upon personal service of the summons upon the defendant. He was decidedly wrong.

For the reasons stated the warrant of attachment order for substituted service and judgment herein will be vacated and set aside, with costs.

KROM v. KURSHEEDT, RESPONDENT; WELLMAN,
APPELLANT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM, NOVEMBER, 1884.

§§ 3268, 3278.

*Security for costs.—What presence in State does not constitute residence.—
Liability of attorney for costs.*

The fact that at the time of the commencement of an action the plaintiff, who was domiciled with his family in another State, had

* *Orr v. McElwee*.

Krom v. Kursheedt.

been engaged in business in the city of New York for about sixteen years, does not make him a resident of the State within the meaning of section 3268 of the Code of Civil Procedure, which requires non-residents to give security for costs. Mere presence in the State during business hours does not constitute residence.

It is no answer to a motion to charge an attorney with the costs of an action on the ground that his client, being liable to give security for costs had not done so, that the attorney began the action in good faith and in the belief that the plaintiff and his family were domiciled within the State, nor does the omission of the defendant to demand security for costs during the pendency of the action affect the attorney's liability.

(Decided December 1, 1884.)

Appeal by George F. Wellman from an order requiring him to pay the respondent one hundred dollars on account of the costs awarded to him by the judgment in this action.

This action was commenced May 19, 1882, and terminated July 10, 1884, in a judgment in defendant's favor for \$155.85 costs, on which an execution against the property of the plaintiff was issued and returned unsatisfied and the plaintiff examined in supplementary proceedings. Thereafter, on affidavits showing these facts and that the defendant had resided with his family at Plainfield, N. J., since 1876 and had not given security for costs in the action, the defendant moved the court at special term "for an order that George F. Wellman, the attorney for the plaintiff herein, pay to the defendant one hundred dollars on account of the costs awarded to the defendant by the judgment in this action."

On the argument of the motion the appellant presented affidavits avering that the plaintiff had for sixteen years last past been "permanently located and established in business in New York city," and during that period had "not owned any property of any name or nature out of the city and State of New York;"

Krom v. Kursheedt.

that at the time of the commencement of this action, the appellant knew "that the plaintiff was doing business in the city of New York, and had been informed and supposed that plaintiff's family resided in said city of New York, and did not know to the contrary until on or about July 20, when he was informed of the fact by the attorneys for defendant;" that although the action was pending nearly two and one half years, the defendant's attorney served no notice requiring the plaintiff to file security for costs; that had he done so the appellant would have had said costs secured; and that when the action was brought, the plaintiff was responsible for the costs of said action, but during pendency of same he has become embarrassed and unable to meet his obligations.

The court granted the motion, and the order appealed from was thereupon entered.

A. B. Moore, for appellant.

A person having a permanent business in New York which he attends to from day to day is not a non-resident within the meaning of section 3268, though his family be domiciled in another State. *Code Civ. Pro.* §§ 3268, 3278. A party to an action will be considered as residing within the jurisdiction of the court, when both his person and his property can be subjected to a process of the court, issued to the sheriff of the county in which he carries on a permanent business. 1 *Wait's Pr.* 106; 2 *Id.* 568; 10 *How. Pr.* 1; 18 *Id.* 275; 14 *Abb. Pr.* 119. . . . A man can have his residence in one State and his domicile in another. A man has a residence where he is permanently located in business though he board and lodge with his family in another State. See opinion of Chief Justice NELSON in *Frost v. Brisbane*, 19 *Wend.* 11-13; see also 2 *Kent's Commentaries*, 10 ed. 574-576; 19 *Maine*, 293; *Douglas v. Mayor*, 2 *Duer*, 119. . . . The attor-

Krom v. Kursheedt.

ney for the plaintiff ought not to be held liable in any event. He commenced the action in good faith supposing and believing the plaintiff and his family domiciled in the State of New York. The defendant's attorney could not require plaintiff to file security for costs because of his laches. The action had been commenced and pending for more than two years, and a trial had ; if defendant could not compel plaintiff to file security for costs, certainly the attorney for the plaintiff should not be held responsible for costs on the ground that plaintiff is a non-resident. See *Fitzsimmons v. Curley*, 6 *N. Y. Civ. Pro.* 156 ; *Swan v. Matthews*, 3 *Duer*, 613 ; *Florence v. Bulkley*, 1 *Id.* 706 ; *Gardner v. Kelly*, 2 *Sand.* 632.

The motion should have been denied. No reason was stated in the notice of motion why plaintiff's attorney should be charged with costs. No irregularities or other reason specified as required by the rules of practice.

The irregularities must be specified, or grounds of relief stated in the notice of motion or order to show cause. *Lewis v. Graham*, 16 *Abb. Pr.* 126 ; *Supreme Court Rules*, 37.

M. A. Kurshcedt, for defendant, respondent.

By section 3268 of the Code of Civil Procedure, the defendant may require security for costs to be given where the plaintiff was, when the action was commenced, a person residing without the State. By section 3278 of the Code, where a defendant is entitled to require security for costs, as prescribed in section 3268, the plaintiff's attorney is liable for the defendant's costs to an amount not exceeding \$100, until security is given as prescribed in the same title. The order appealed from was therefore fully warranted by the facts shown to the court below. 4 *N. Y. Civ. Pro.* 101, note. The fact stated in the affidavit of the

Krom v. Kursheedt.

plaintiff that his business residence was in the city, did not constitute any defense to the motion. His actual residence was, nevertheless, without the State. *Wallace v. Castle*, 68 *N. Y.* 370, 374; *Chaine v. Wilson*, 1 *Bosw.* 673; *Barry v. Bockover*, 6 *Abb. Pr.* 374; 4 *N. Y. Civ. Pro.* 37, note. The omission of the defendant to demand security for costs while the action was pending, does not affect the attorney's liability. *In re Levy*, 2 *N. Y. Civ. Pro.* 108; *Boyce v. Bates*, 8 *How. Pr.* 495.

FREEDMAN, J.—This is an appeal by George F. Wellman, the attorney for the plaintiff, from an order requiring him as such attorney to pay to the defendant the sum of \$100 on account of the costs awarded the defendant in the action. At the time of the commencement of the action the plaintiff resided with his family at Plainfield, New Jersey, and he still continues to reside there.

By section 3268 of the Code of Civil Procedure, the defendant may require security for costs to be given where the plaintiff was, when the action was commenced, a person residing without the State; and by section 3278 the plaintiff's attorney in such a case is made liable for the defendant's costs to an amount not exceeding \$100, until security is given as prescribed, although the defendant has not required such security to be given.

It is claimed, however, by the appellant, that because it was made to appear by affidavit that at the time of the commencement of the action, the plaintiff had been engaged in business in the city of New York for about sixteen years, he was not a non-resident within the meaning of section 3268, though he and his family were domiciled in another State.

After a careful examination of the cases cited to illustrate the distinction between residence and dom-

Krom v. Kursheedt.

icil, and conceding that a person can have a residence in one State and his domicile in another, I fail to see how the appellant can be relieved. Mere presence in the State during business hours has never yet been held to constitute residence. On the contrary, in the enforcement of our attachment laws against non-residents, it has repeatedly been held that presence during business hours in this State does not amount to residence (*Wallace v. Castle*, 68 *N. Y.* 370; *Chaine v. Wilson*, 1 *Bosw.* 673; *Barry v. Bockover*, 6 *Abb. Pr.* 374).

In the absence, therefore, of a statutory provision making presence during business hours in the State equivalent to residence, in the construction of section 3268, the order appealed from was fully warranted by the facts shown to the court below.

It is no answer, under section 3278, that the appellant commenced the action in good faith, and in the belief that the plaintiff and his family were domiciled in New York. Nor does the omission of the defendant to demand security for costs during the pendency of the action affect the attorney's liability (*Matter of Levy*, 2 *N. Y. Civ. Pro.* 108).

There being no merit in any of the points raised by the appellant, the order appealed from should be affirmed, with costs, &c.

SEDGWICK, Ch. J., and VAN VORST, J., concurred.

Hayes v. Davidson.

HAYES AS ASSIGNEE, ETC., OF GRANT, APPELLANT,
v. DAVIDSON, SHERIFF OF THE CITY AND COUNTY
OF NEW YORK, ET AL., RESPONDENTS

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
OCTOBER, 1884.

§§ 1421-1425.

Sheriff.—Substitution of indemnitors for, in action against, for wrongfully taking, etc., personal property.—Instance of case in which properly ordered.—Liability of indemnitors.—Waiver of objection.

Where, in an action by an assignee for the benefit of creditors against a sheriff to recover for the alleged wrongful taking of certain personal property seized and taken by the sheriff under four attachments and an execution against the assignor, it appeared that the property was held and sold by the sheriff under such attachments and executions and under two other attachments and three other executions issued against the property of the assignor after the assignment, and that the attaching creditors and the creditors in two of the executions had at different times given bonds of indemnity to the sheriff, which bonds contained the same conditions, and were not given to protect the sheriff from liability as to any specific or divisible portion of the property but applied to the whole,—*Held*, that an order was properly granted substituting such indemnitors as defendants in place of the sheriff; that if the seizures of the property or the holding possession of and afterwards selling it were wrongful, the parties to the bonds rendered themselves jointly liable for the wrong by their undertaking to save the sheriff harmless from loss for holding the property against the claim of the plaintiff; [2, 4, 5] that the same evidence required to present the case against the sheriff, with the addition of the fact of the execution and delivery of the bonds, would present it completely and effectually against the parties who executed the bonds, and no important right or interest of the plaintiff would be in any respect jeopardized or changed by substituting those parties as defendants in the action in place of the sheriff. DAVIS, P. J. (dissenting),—*Held*, that the

Hayes v. Davidson.

provision of the Code for such substitution was only intended to apply to clear and plain cases of liability by indemnitors for any and all the grounds of action upon which the plaintiff at the trial might elect to stand. [9] and that substitution should not have been ordered in this case. [10]

If in such a case any of the bondsmen were limited in the extent of their liability to only a portion of the property seized under any particular attachment or execution, a substitution should not be ordered, for the joint action could not be made divisible or apportioned in such a manner as to determine the amount for which a liability would arise under each respective attachment or execution. [1, 10]

Where parties, even after the seizure of property by the sheriff, furnish him with indemnity against liability for his acts in taking, holding and disposing of it, if a wrong was committed by the seizure they make themselves parties to the wrong and liable for the full value of the property so seized. [3]

If the objection that an indemnity bond was not given until after the commencement of the action is not made on a motion to substitute the indemnitors therein in place of the sheriff in an action against him for wrongfully seizing personal property, it is waived and cannot be raised on appeal from an order granting the motion. [6]

(Decided November 13, 1884.)

Appeals from orders substituting the obligors in certain bonds of indemnity as defendants in place of the sheriff in an action brought against him for seizing and converting personal property.

The facts appear in the opinions.

Peter Condon, for plaintiff, appellant.

William Burke Cockran, for the sheriff, respondent.

George F. Langbein, Edward S. Hatch and Blumenstiel & Hirsch, for the bondsmen, respondents.

DANIELS, J.—The property in suit and for the value of which the plaintiff, as substituted assignee,

Hayes v. Davidson.

claims to recover against the sheriff, consisted of a stock of goods and fixtures contained in the store 28 West Twenty-third street, occupied by Duncan A. Grant. He had previously made a general assignment for the benefit of his creditors to a predecessor of the plaintiff, who commenced this action as a substituted assignee. After the assignment, the property was seized by the sheriff, on January 4, 1884, under four attachments and one execution, issued in favor of as many different creditors. The sheriff, on January 4, seized and took possession of all the stock and fixtures contained in the store previously occupied by the debtor. After that, and on January 12, 1884, another attachment was issued to him, and still another on the 26th of the same month, and on the 14th of that month another execution was issued to him against the same debtor. Three other executions were also issued, and the sheriff finally held possession of the property under all the attachments and the five executions. The creditors for whose benefit the property was seized by the sheriff under the attachments, and the executions issued on January 3 and 14, severally delivered to the sheriff bonds of indemnity to indemnify him and save him harmless from loss by reason of his holding the property against the claim of the assignee. These bonds were given at different times, but they were all stated to have contained the same condition. And under and by virtue of the indemnity so provided, and the process issued to the sheriff, he afterwards sold the property seized, with the exception of eleven cases of goods of the value of \$4,000, which were returned to the plaintiff. After this indemnity had been provided for, the sheriff, the attaching creditors, and the creditors in the two executions, who executed the bond with their sureties, applied to the court to be substituted as the defendants in the action in the place of the sheriff, under the

Hayes v. Davidson.

authority of section 1421 of the Code, and an order to that effect was made by the court, placing the applicants in the legal position where they themselves were at liberty to take charge of the defense of the action in their own behalf.

It has been objected that the sureties to the sheriff, severally securing the seizure of property in this manner, are not entitled under the authority of this section to be substituted in his place as defendants in the action. And if any of the applicants were limited in extent of their liability to only a portion of the ['] property seized under any particular attachment or execution, the objection would probably be well founded, for the joint action could not be made divisible or apportioned in such a manner as to determine the amount for which a liability would arise under each respective attachment or execution. An order in such a case would subject the plaintiff to too many risks and embarrassments to render it a proper exercise of discretion under this section. If made at all in a case of that description it would necessarily be for a division of the action under section 1424 of the Code, limiting the liability of the applicants to that part only of the property as might have been seized or taken under his or their process. But in this action no difficulty of that description can possibly be encountered. For it was after the sheriff had seized the entire stock of goods and fixtures that the several bonds of indemnity were given to him, and by virtue of these bonds the property was retained and afterwards sold. If the seizures of the property, under the attachments and the executions were wrong- ['] ful, the parties to these bonds rendered themselves liable for the wrong by their undertaking to save the sheriff harmless from loss for holding the property against the claim of the plaintiff. Neither of the bonds was given to protect him from such liability as

Hayes v. Davidson.

to any specific or divisible portion of the property, but the language of each of the bonds is shown to have been so broad as to include all the property which the sheriff had seized. For that reason it cannot be important to inquire whether he had made an excessive seizure or taken more property into his possession than the attachments and the executions authorized him to take. For by these bonds, the parties to them took upon themselves the entire responsibility of saving the sheriff harmless from loss for taking all the property, as that has been done under the processes issued to him; for, where parties even after the seizure of property by the sheriff furnish him with indemnity against liability for his acts in taking, holding ['] and disposing of it, they make themselves parties to the wrong, if a wrong was committed by the seizure, and liable for the full value of the property so seized (*Herring v. Hoppock*, 3 *Duer*, 20; affirmed, 15 *N. Y.* 409; *Griffiths v. Hardenburgh*, 41 *Id.* 464; *Chapman v. O'Brien*, 39 *N. Y. Super. Ct.* 244).

Whether, therefore, the sheriff seized and sold no more of the property than was necessary to satisfy the debts mentioned in the attachments and executions or made an excessive seizure, it is not necessary to inquire; for the persons executing the several bonds ['] assumed the responsibility of all that he had done in that respect and subjected themselves to the liability of saving him harmless from the legal consequences of his acts. They practically combined the seizures which had been several, and previously made, and assumed their consequences as one act, by means of the bonds executed and delivered to the sheriff. And the case was then presented substantially the same as a single seizure under the attachments and executions, which brought it within the spirit, if not literally within the language, of section 1421 of the Code.

Hayes v. Davidson.

From that time the creditors and their sureties ['] were all united in maintaining and protecting the act of the sheriff in holding possession of and afterward selling the property. And if any wrong or legal liability was created by his acts in doing that, the parties to each of these bonds became jointly liable for the consequences of those acts and that presented a case within this section of the Code (*Malcolm v. O'Reilly*, 89 *N. Y.* 156; *Hessberg v. Riley*, 3 *N. Y. Civ. Pro.* 165; *Hein v. Davidson*, 5 *Id.* 391).

It has been objected to the order that it was not made to appear by the affidavits in support of the motion that the bonds were given previous to the commencement of the suit. But if that were necessary, a strong probability arises that they were so given. The first was executed and delivered on the 9th of January, 1884, and the last on the 13th of February, 1884, and it was not intimated in the affidavit made by the plaintiff that the suit against the sheriff had been commenced before that time. If that was the fact, and any advantage could be derived from it by stating it, the plaintiff should at least have suggested it in ['] the affidavit made by him for the purpose of opposing the motion. That was not done, neither does it appear that any objection was taken to the omission of the statement on the hearing of the motion which resulted in the order. If it had then been made, proof on the subject could have been supplied by the permission of the court, which would have removed all uncertainty as to this fact in the case, and the plaintiff's failure to present the objection at that time precludes him from deriving any advantage from it when first made upon the hearing of the appeal.

It was also objected that the order should not ['] be made without requiring a stipulation from the indemnitors allowing the statements or admissions made by the sheriff to be given in evidence against

Hayes v. Davidson.

them upon the trial. But the right to give such testimony cannot be an important one to the plaintiff; for proof of the fact can be really given that the sheriff did seize the entire stock and fixtures contained in the store No. 28 West Twenty-third street, and the bonds given by the applicants, even though less in the aggregate than the value of the property, subjected them to liability for all the consequences of such seizure. And those facts, together with the proof of the value of the property seized, will be all that can be required to make out the plaintiff's right to recover, in the first instance; and it will be for the defendants themselves to establish the fact, if that can be done, that they were entitled to seize the property notwithstanding the preceding assignment of their debtor.

The same evidence required to present the case [°] against the sheriff, with the additional fact of the execution and delivery of the bonds, will present it completely and effectually against the parties executing those bonds, and no important right or interest of the plaintiff will be in any respect jeopardized or changed by substituting those parties as defendants in the action in place of the sheriff.

The fact that the sheriff also acted under three other executions in seizing and holding the property is a circumstance of no importance. For as to all the property which he took, the parties executing the bonds rendered themselves jointly liable to the plaintiff.

The order for these reasons was right and it should be affirmed, with \$10 costs and the disbursements.

BRADY, J.—I concur with DANIELS, J. I think his reasons are conclusive.

DAVIS, P. J.—I do not concur in the conclusions of

Hayes v. Davidson.

my brother DANIELS in this case. A complete and perfect cause of action arose in favor of the plaintiff upon the first seizure of the stock of goods on the 4th of January, 1884, when the sheriff attached and took possession of the stock of goods by virtue of the attachments and execution then in his hands. The plaintiff has a right to rely on that cause of action if he chooses. Subsequently, on other and different days other attachments and executions came to his hands upon which he entered attachments and levies of the same stock then in his possession. All the several creditors in whose behalf the several processes were issued after their respective levies gave several and separate bonds of indemnity to the sheriff under which he proceeded. They all now seek to be substituted as defendants in the action against the sheriff, and to have him discharged therefrom. Under such circumstances this is neither just nor equitable. Several of the defendants are not liable for the first seizure, nor do their bonds of indemnity extend to that. If the plaintiff prefers upon the trial of the action against the sheriff to rely wholly on the seizure made on the 4th of January, 1884, he is entitled to do so, and for that cause the creditors who subsequently issued attachments and executions are not liable to plaintiff nor bound to indemnify the sheriff. Nor is the plaintiff under any obligation to accept as substituted defendants in his action parties who, to say the least, will have power to raise against him embarrassing and doubtful questions touching their liability for acts of the sheriff, done for the exclusive benefit of others before their processes were put in his hands. The provision of the Code for such substitution was only intended to apply to clear ['] and plain cases of liability, or by indemnitors, for any and all the grounds of action upon which the plaintiff at the trial may elect to stand.

I think there are many embarrassing questions in

Hayes v. Davidson.

this case that may be sprung upon the trial against the plaintiff if the substitution be made. For instance, if the sheriff was not liable for tort in the original seizure, but made himself so by subsequent misconduct affecting the property taken, by which it was lost or injured in value prior to the coming in of the second or third batches of process, the plaintiff may be greatly embarrassed in attempting to hold the last set or indeed any of the indemnitors for that cause of action; and so if he chooses to stand on trial on proof of the seizure and removal of the goods on the 4th of January it is difficult to see why a party who had nothing to do with that wrong would not be entitled to a non-suit. It is not easy to see why, if all the parties sought to be substituted as defendants are in, it will not be necessary as against each of them to show either a joint or several wrongful act for which he is chargeable. The plaintiff may therefore be forced to establish a series of wrongs before he can make out a cause of action against all the parties, while against the sheriff he may stand upon a single one.

To my mind the case presented on the motion is not one upon which the court, in the exercise [°] of sound discretion, ought to uphold the order of substitution. It cannot, nor indeed should it, compel a division of the action into several actions, because that is imposing the burden of several litigations upon the plaintiff, where, in both fact and law, he has a single one against a single defendant, of which he cannot be deprived.

I think the order should be reversed, and the motion denied.

Hurd v. Hannibal, &c. R. R. Co.

HURD, APPELLANT v. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, MAY, 1884.

§§ 1326 *et seq.**Appeal.—Corporate guarantee of undertaking on.—Form of undertaking so guaranteed.—Justification.*

The statute (*Laws* of 1881, chap. 481), authorizing the acceptance of bonds and undertakings guaranteed by certain corporations, so far modifies the provisions of the Code of Civil Procedure, requiring two sureties in an undertaking on appeal as to dispense with them when such a guarantee is given.

An undertaking in the form required by the Code of Civil Procedure given and executed by the appellant and guaranteed by a corporation organized or authorized to do business under the laws of this State and guarantee the fidelity of persons holding positions of public or private trust, is sufficient on an appeal from a judgment, to the court of appeals.

Where an undertaking on appeal is guaranteed by a corporation authorized to guarantee such undertakings, the respondent should be permitted to examine the officers of the company as to its ability to enter into and make the guarantee.

Where an act of the legislature (*Laws* of 1881, chap. 486), entitled "an act to facilitate the giving of bonds required by law" applied to both bonds and undertakings,—*Id.*, that as bonds and undertakings are to a great extent understood to be convertible terms, the title of the act was not materially deficient;[*] that if it had been it would be of no importance for the reason that the act is neither a private nor a local one.

(Decided May 30, 1884.)

Appeal from an order approving an undertaking given by the defendant on an appeal to the court of appeals.

The undertaking was executed by the defendant and the performance of its covenants and conditions

Hurd v. Hannibal, &c. R. R. Co.

guaranteed by the Fidelity and Casualty Company of New York.

The plaintiff excepted to the sureties, and the defendant gave notice of justification and upon the return day, the president of the Fidelity and Casualty Company attended in court to justify, when the plaintiff's counsel objected to the form of the undertaking. The court overruled the objections and deciding that an examination of the guarantor's officers was not necessary, approved the undertaking.

Lyman B. Bunnell, for plaintiff-appellant.

Joseph Kunzman (*Elihu Root*, attorney), for defendant-respondent.

Thomas S. Moore (*Moore, Low & Sandford*, attorneys), for The Fidelity & Casualty Co.

Cited *Ryan v. Cochran*, 11 *Abb. N. C.* 111; *Colgate v. Penn. R. R. Co.*, 11 *Id.* 111; *Matter of Filor*, 11 *Id.* 107.

DANIELS, J.—The undertaking is in the form prescribed by the Code of Civil Procedure on an appeal from a judgment to the court of appeals. It was given and executed by the defendant in its corporate capacity, and added to or indorsed upon it was a guaranty of the Fidelity and Casualty Company of New York by which it guaranteed the performance of the covenants and conditions of the within bond. This guarantee was taken under the authority of chapter 48th of the Laws of 1881, by which any surrogate, judge, sheriff, district attorney or any other officer having authority, or required to approve of the sufficiency of a bond or undertaking may in his discretion, accept a bond and undertaking and approve the same whenever its conditions are guaranteed by a company duly organized or authorized to do business under the laws of this State and guarantee the fidelity of persons

Hurd v. Hannibal, &c. R. R. Co.

holding positions of public or private trust and vesting such corporation with full power to guarantee such bonds and undertakings. This language was clearly so broad as to include the undertaking given upon the appeal in this action ; and as the company was a corporation having authority to guarantee the fidelity of persons holding positions of public or private trust, it was by this act empowered to make the guaranty it did of this undertaking.

The act has been objected to as not being sufficiently broad in its title to justify the enactment. It is entitled an "act to facilitate the giving of bonds required by law." But as bonds and undertakings are to a very great extent understood to be convertible terms, the title of the act was not materially deficient. But if it had been it would be of no importance for the reason that the act is neither a private nor a local law. The power and ability of the company to act in this capacity was made the subject of investigation by the general term of this department, and as it appeared to be incorporated under the general laws of the State and authorized to transact business by way of guaranteeing the fidelity of persons holding positions of public or private trust, this authority to guarantee bonds or undertakings subject to judicial approval was found to exist, and it was accepted as competent for that purpose.

The act has necessarily so far modified the provisions of the Code of Civil Procedure, requiring two sureties in such an undertaking as to dispense with them when a guarantee of this description may be given. That was clearly its object as to all bonds and undertakings. It was to substitute the guarantee of the bond in place of the liability and obligation of the sureties otherwise required by law.

The court refused to permit the plaintiff to examine the officer of the company as to its liability to

Estate of Singer.

enter into and make the guaranty. This we think was erroneous. When the specific objection was overruled further proceedings should have been taken to examine the officers on behalf of the respondent, if he so desired, and thereupon the court should have approved or disapproved of the undertaking. The order should be modified accordingly, and as so modified affirmed, without costs.

DAVIS, P. J., concurred.

ESTATE OF ISAAC M. SINGER, DECEASED.

SURROGATE'S COURT, WESTCHESTER COUNTY, DECEMBER, 1884.

§ 2481 sub. 6.

Accounting of executor, trustee and guardian.—When decrees made on, will not be opened—Power of surrogate's court.

Before the Code of Civil Procedure a surrogate had power to open a decree for an excusable default resulting injuriously to the defaulting party, for clerical errors, for frauds in procuring the decree and other like causes. The only additional power conferred by the Code (§ 2481 sub. 6), is to grant a new trial or hearing for newly discovered evidence.[¹]

A surrogate's court had no power before the Code of Civil Procedure to open a decree made on an accounting, and grant a rehearing for an error of law, and the power to do so has not been conferred upon it by that Code.[²]

When an intelligent and competent person is appointed special guardian of a minor on the accounting of an executor, testamentary guardian or trustee, the decree made binds the minor as much as it would an adult.[³]

Estate of Singer.

Story v. Dayton (22 *Hun.* 450);^[2] Tucker v. McDermott (2 *Redf.* 312);^[3] In re Tilden (6 *N. Y. Civ. Pro.* 15), ^[4] distinguished.
(Decided December, 1884.)

Motion that a decree made on the accounting of David Hawley as executor of the will of the deceased, and two decrees made on accountings by him as trustee and guardian under said will, be opened, etc.

David Hawley, the testamentary guardian and trustee of Adam M. Singer, under the last will and testament of Isaac M. Singer, deceased, upon his ward's attaining his majority, caused a citation to be issued, requiring him to attend a settlement of his accounts as such guardian, &c. Pending this proceeding and before the filing of the account said Adam M. Singer made this application, praying that a decree made on the accounting of said Hawley, as executor, &c., of the will of the deceased, entered in 1877, and that two other decrees made on accountings by him as trustee and guardian of the applicant, entered respectively in 1878 and 1881, might be opened, vacated, modified or set aside, so far as to permit him to contest the allowance of commissions made to said executor, as such, and as trustee and guardian, by said several decrees, alleging that the same exceed the amounts allowable under the statutes, and that some portion thereof were illegal by reason of being based upon the estimated value of certain shares of stock in the Singer Manufacturing Company, claimed to have been specifically bequeathed; and also, to permit him to contest certain items of expenditure allowed for legal expenses, and legal and other services, and also to contest the direction in said decrees contained as to said stock, and the distribution of the proceeds of certain realty.

It appeared on the hearing of the motion that on each accounting a special guardian was appointed for the applicant, then a minor.

Estate of Singer.

C. E. Tracy, for the petitioner and motion.

E. N. Bangs, for the guardian, etc., opposed.

COFFIN, S.—There can be no doubt that subdivision 6 of section 2481 of the Code, is inapplicable to this case. The proceeding for the last of the series of accountings was commenced before chapter 18 went into effect, and § 3347, subd. 11, does not make it apply to such a proceeding. Nevertheless, that section was partly based upon former decisions of the courts, and was extended, also, so as to embrace a broader field of jurisdiction. Before the Code, a surrogate had [] power to open decrees for an excusable default resulting injuriously to the defaulting party, for clerical error, for fraud in procuring the decree, and other like causes. The only additional power conferred is to grant a new trial or hearing “for newly discovered evidence.” Hence, I regard it as wholly immaterial, in this case, whether subd. 6 is or is not applicable.

This brings us at once to the question, such as it is, whether this court can grant a rehearing for an error in law. This case certainly presents no features resembling fraud, error in placing or adding figures, procuring a signature to any important voucher by fraudulent representations by which a credit is obtained, presenting a forged voucher and the like.

The facts in the memorandum of the case of [] *Story v. Dayton* (22 *Hun*, 450) are not very fully stated. It would seem that one ground of complaint was the appointment of an improper person—a clerk in the office of the administrator's attorney—as the guardian *ad litem* for the minors. The case as reported discloses no particular errors of fact or mistakes justifying the decision to the effect that the order of the surrogate be reversed “unless the respondent

Estate of Singer.

will stipulate that the decree on final settlement may be amended in the particular specified in the opinion herein," none of which are specified in so much of the opinion as is published. Apparently, errors in fact are the subject of the allusion.

Tucker v. McDermott (2 *Redf.* 312) has no ['] application, as it was not on a motion to open a decree.

In re Tilden (6 *N. Y. Civ. Pro.* 15), no special guardian for the minor was appointed on the first accounting, which occurred in 1872, before the passage of any act requiring the appointment of such on an accounting. But at that time it was proper, as a matter of practice, to do so, and was then the actual practice of this court, and it had the effect of concluding him (*Dayton's Sur. Pr.* 505-7, 3d ed.; *Kellett v. Rathbone*, 4 *Paige*, 102). This fact, alone, warranted the opening of the first decree, and any alteration of that necessarily affected and involved the correction of other and subsequent accountings where special guardians had been appointed. But, in that case, the question here presented does not seem to have been raised, discussed or considered.

It is thus shown that the authorities cited by the learned counsel for the petitioner furnish but a feeble support to the proposition he urges. If there were any such errors committed in the decrees as are complained of, and as to which I am not now in a position to determine, they were purely and simply errors of law. The question as to the proper amount of commissions to be allowed is not, in many cases, easy of solution, as is evidenced by many recent and conflicting decisions in various courts. Hence, the erroneous fixing of them in the decree or the refusal by the court to allow any at all (of which I have heard) cannot be characterized as a fraud, a mistake, a clerical error or the like. It is simply an error in law, however ignor-

Estate of Singer.

ant, corrupt or negligent the court may have been in the discharge of his duty, and the only remedy, if the court, on attention being called to it *dum ferret opus*, fail to correct it, is by appeal. The decree embodies the deliberate and solemn, even if reprehensible, judgment of the court. This court, before the Code, [°] possessed no power to open such a decree and grant a rehearing in such a case, and none has been conferred upon it since, as the phrase for "other sufficient cause," is to be construed as applying to causes *ejusdem generis* only.

It will, I think, be conceded that questions relating to the allowance of commissions on specific bequests have arisen mainly as matters of law concerning the nature of the bequest as being specific or otherwise. Their allowance or rejection is still a question of law. And whatever the adjudication may have been, it can only be remedied, if erroneous, by appeal, and not by a motion of this character.

The authorities cited by the counsel for the [°] trustee abundantly establish the principle that where an intelligent and competent person is appointed the special guardian for the minor, the decree binds him as much as it would an adult. No allegation is made as to any want of intelligence or competency of the several persons who were appointed and acted as such on the various accountings, nor is there any suggestion of fraudulent conduct on their part. The other errors complained of belong to the same category, no errors of fact being assigned, and must be disposed of accordingly. Whether errors were committed on any or all of the accountings, it is, therefore, needless to inquire. In any event, the petitioner having been represented by special guardian on each occasion, and the time to appeal having expired. I cannot but regard him as concluded. Motion denied.

De Vivier v. Smith.

DE VIVIER ET AL. v. SMITH.

CITY COURT OF NEW YORK, CHAMBERS, DECEMBER,
1884.

§ 2464.

Supplementary proceedings.—Appointment of receiver.

A receiver of the property of a judgment debtor may be appointed in proceedings supplementary to execution either before or after the return of the execution, upon the examination of a third person indebted to or having property of the judgment debtor.

(Decided December 17, 1884.)

Application by judgment creditor for the appointment of a receiver of the property of his judgment debtor.

The facts are stated in the opinion.

Edward Bartlett, for the motion.

Guggenheimer & Untermeyer, opposed.

McADAM, Ch. J.—Frederick Hackman, a third person, having property belonging to the judgment debtor, was examined under an order supplementary to the issuing and before the return of the execution herein.

The plaintiff moves for the appointment of a receiver, and the third person objects that the application cannot be founded on the examination of a third person, particularly before the return of an execution unsatisfied. It was held under the old Code that a receiver could not be appointed where supplementary proceedings were instituted before the return of the execution (*Darrow v. Lee*, 16 *Abb. Pr.* 215). Mr.

De Vivier v. Smith.

Throop, in a note to his edition of the Code (see note preceding § 2464), says: "The books are full of cases, where the validity of such appointments has been tacitly, if not expressly recognized," and he refers to *Tillotson v. Wolcott* (48 *N. Y.* 188), and *West Side Bank v. Pugsley* (47 *Id.* 368). He adds "that the practice of appointing a receiver in proceedings taken before as well as after the return of an execution, had become so inveterate that the commissioners were unwilling to propose its abrogation."

In order to effectually preserve the right to appoint a receiver before, as well as after, the return of an execution, section 2464 provides that, "At any time after making the order requiring the judgment debtor, or any other person, to attend and be examined, the judge . . . may make an order appointing a receiver of the property of the judgment debtor," &c.

The same section provides for notice to the judgment debtor and for cases in which such notice may be dispensed with. In the present instance the judgment debtor could not be found, and the judge dispensed with notice to him. Section 2441, in regard to supplementary proceedings against third persons, is in harmony with § 2464 (*supra*), and clearly indicates that a receiver may be appointed upon such an examination, either before or after the return of the execution.

The fact that § 2446 authorizes the judge to make an order permitting the third person to pay the sheriff on account of the execution in his hands, money conceded to be due to the judgment debtor, and the additional fact that § 2447 authorizes the judge to make an order directing the third person to deliver over property in his possession to the sheriff, does not limit the power of the judge, for the section last referred to provides that the money or property be delivered to the sheriff, "unless a receiver has been appointed," &c.

Note on Appointment of Receiver in Supplementary Proceedings.

The fact of indebtedness to the judgment debtor is conceded by the third person, but the amount has not as yet been fully ascertained, so that no order for the payment over of a specific sum can be made.

It follows, therefore, that the application for the appointment of a receiver is appropriate, and that the application therefor must be granted.

NOTE ON APPOINTMENT OF RECEIVER IN SUPPLEMENTARY PROCEEDINGS.

When and by whom appointed.—Notice of application.—Extending former receiverships—Filing order.—Security.—Removing receiver.—Effect of appointment on proceedings.

When and by whom appointed. The Code of Civil Procedure (§ 2464) provides that "at any time after making an order requiring the judgment debtor, or any other person to attend and be examined or issuing a warrant" for the arrest of a judgment debtor about to leave the state or conceal himself, "the judge to whom the order or warrant is returnable may make an order, appointing a receiver of the property of the judgment debtor."

Under this provision a receiver may be appointed at any time after the granting of an order (or warrant), for the examination either of the debtor or a third person, and irrespective of whether the execution has been returned. *De Vivier v. Smith, supra.*

Under the old Code it was held that an application for the appointment of a receiver in supplementary proceedings must be made to the judge who granted the order; no other judge out of court had the power. *Ball v. Goodenough*, 37 *How. Pr.* 479; *Hatch v. Weyburn*, 8 *Id.* 163; *Smith v. Johnson*, 7 *Id.* 39. Now the appointment must be made "by the judge to whom the order is returnable" (*Code of Civil Procedure*, § 2464). As to whom order is returnable, see *Ibid.* § 2434.

The order must be a chambers order. *Ball v. Goodenough*, 37 *How. Pr.* 479.

The appointment cannot be made after the proceedings have been discontinued by a failure to adjourn them. *Wright v. Nostrand*, 47 *N. Y. Super.* (15 *J. & S.*) 441.

Unless the proceedings are regularly adjourned, they are terminated and jurisdiction is lost. *Ammidon v. Wolcott*, 15 *Abb. Pr.* 314; *Carter v. Clarke*, 7 *Robt.* 490; *Thomas v. Kircher*, 15 *Abb. N. S.* 342; *Bennell v. McGuire*, 58 *Barb.* 625.

Note on Appointment of Receiver in Supplementary Proceedings.

Although it is unusual and a work of supererogation to appoint a receiver where no property has been disclosed, it has been held that the judgment debtor cannot object to the appointment of a receiver on that ground, as he cannot be prejudiced by the granting of such an application (*Myres' Case*, 2 *Abb. Pr.* 476; 4 *Paige*, 574; 6 *Id.* 29; 8 *Id.* 568), but the practice is not to appoint a receiver unless some property has been disclosed.

Where the only property disclosed on the examination was exempt, *Held*, that the application must be denied. *Keiber v. Shipherd*, 4 *N. Y. Civ. Pro.* 275.

It is no objection to the appointment of a receiver that the debtor has no property other than an equity of redemption which he has always been willing to have sold. *Bailey v. Lane*, 15 *Abb. Pr.* 373, *note*.

Where the examination discloses choses in action or the existence of a relation, like a partnership, rendering probable that there may be assets, the appointment may be made. *Webb v. Overmann*, 6 *Abb. Pr.* 92. Where the examination discloses only an estate of tenancy by curtesy the receiver may be appointed. *Beamish v. Hoyt*, 2 *Rob.* 307. Or an equity of redemption in real property. *Bailey v. Lane*, 15 *Abb. Pr.* 373 (n.)

Where it appears doubtful whether a third person examined as debtor of the judgment debtor, or another person is indebted to the judgment debtor, a receiver should be appointed. *Corning v. Tooker*, 5 *How. Pr.* 16.

In *Bann v. Daly* (24 *Hun.* 556) it was *held*, that where, upon the examination of the debtor, it appears that he has an estate in land as tenant by the curtesy, and it is not shown that an execution has been issued and returned since he acquired it, the proper course is not to appoint a receiver; but the creditor should be required to issue another execution, and sell the estate thereunder. See also *Finkey v. Langdon*, 13 *N. Y. Weekly Dig.* 384; *In re Englehart*, 1 *Sheldon*, 514.

Notice of application. "At least two days' notice of the application for the order appointing a receiver, must be given personally to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the State, in which case, the order must recite that fact, and may dispense with notice or may direct notice to be given in any manner which the judge thinks proper. (Code of Civil Procedure, § 2465; *Strohn v. Epstein*, 6 *N. Y. Civ. Pro.* 36; *Morgan v. Van Kohnstamm*, 9 *Daly*, 355; *Wright v. Nostrand*, 47 *N. Y. Super.* [15 *J. & S.*] 441.) But where the order to attend and be examined, or the warrant has been served upon the judgment debtor, a receiver may be appointed upon the return day

Note on Appointment of Receiver in Supplementary Proceedings.

thereof or at the close of the examination, without further notice to him." *Code of Civil Procedure*, § 2465.

Where upon the conclusion of an examination of a judgment debtor before a referee and upon filing the testimony taken before the referee, a receiver of the judgment debtor's property was appointed without notice,—*Held*, that the order was irregular and must be set aside. *Strohn v. Epstein, supra*. To same effect, *Todd v. Crooke*, 4 *Sandf.* 694; *Ashley v. Turner*, 22 *Hun*, 226.

The notice must be given notwithstanding the application for a receiver is made on the examination of a third person. *Morgan v. Van Kohnstammi*, 60 *Hon. Pr.* 161.

The notice of the application must be *personally* served on the judgment debtor unless otherwise ordered (*supra*; *Barker v. Johnson*, 4 *Abb. Pr.* 435; *Dows v. Noxon*, 5 *Hon. Pr.* 29; *Corning v. Tooker*, 5 *Id.* 16; *Kemp v. Harding*, 4 *Id.* 178); and must be in writing; a verbal notice is insufficient. *Ashley v. Turner*, 22 *Hun*, 226.

In *Sickels v. Hanley* (4 *Abb. N. C.* 231, Sup. Ct. 4 Dept. March, '78) it was held under the Code of Procedure that an order to appear for examination before a referee may direct the debtor to appear before the judge on the Monday following the close of the examination; and notwithstanding his failure so to appear, a receiver may be there appointed if the examination discloses a proper case for a receiver.

If a judgment creditors' action or proceedings supplementary to execution are pending against the judgment debtor and a receiver has not been appointed therein, notice of the application for the appointment of a receiver must be given, in such a manner as the judge directs, to the judgment creditor, prosecuting it. *Code of Civil Procedure*, § 2465.

It was held under the Code of Procedure that the creditors proceeding against the judgment debtor were entitled to notice of the application but not to a copy of the examination on which it was founded. *Todd v. Crooke*, 4 *Sandf.* 694.

Where such notice is omitted the order should be vacated. Supm. Ct. Sp. T. N. Y. Co., *Fraser v. Hunt*, *N. Y. Daily Reg.*, Dec. 13, 1882.

Extending former receiverships. Only one receiver of the property of a judgment debtor can be appointed. *Code of Civil Procedure*, § 2466; *Bostwick v. Menck*, 40 *N. Y.* 383; rev'g S. C., *sub nom.* *Bostwick v. Beizer*, 10 *Abb. Pr.* 197; *Myrick v. Seldon*, 36 *Barb.* 15.

Where a receiver of the property of a judgment debtor has been appointed, the judge, instead of appointing a receiver, "must make an order extending the receivership to the special proceeding before him." *Code of Civil Procedure*, § 2466.

Such an order gives to the judgment creditor the same rights as if a receiver was then appointed upon his application; including the

Note on Appointment of Receiver in Supplementary Proceedings.

right to apply to the court to control, direct or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed, to those taken under his judgment. *Code of Civil Procedure*, § 2466.

Where a receiver of the judgment debtor's property has been appointed in supplementary proceedings, the court is not precluded from appointing another person as receiver in a judgment creditor's action, if in its discretion it sees fit to do so. *State Bank of Syracuse v. Gill*, 23 *Hun*, 410.

Filing order. "An order appointing a receiver, or extending a receivership, must be filed in the office of the clerk of the county, wherein the judgment roll in the action is filed; or, if the special proceeding is founded upon an execution issued out of a court, other than in which the judgment was rendered, in the office of the clerk of the county wherein the transcript of the judgment is filed." *Code of Civil Procedure*, § 2467.

As to place of filing and necessity of recording order before enactment of *Code of Civil Procedure*, see *Code of Procedure*, § 298; *Laws of 1813*, chap. 86; *Wright v. Nostrand*, 47 *N. Y. Super.* (15 *J. & S.*) 441; *rev'd* 94 *N. Y.* 31; *Ball v. Goodenough*, 37 *How. Pr.* 497; *Rockwell v. Merwin*, 45 *N. Y.* 166; *Scroggs v. Palmer*, 66 *Barb.* 505; *People ex rel. Kingsland v. Palmer*, 52 *N. Y.* 83; *McKenna v. Edmonston*, 91 *Id.* 231; *Whipple v. Christian*, 80 *Id.* 523; *Wright v. Nostrand*, 94 *Id.* 32; *Fredericks v. Niver*, 28 *Hun*, 417.

A certified copy of the order should also be filed with the clerk of every other county wherein any real property is situated, and if he resides without the county where the original order is filed, with the clerk of the county where he resides. *Code of Civil Procedure*, § 2468.

A county clerk with whom the order or a certified copy thereof is filed must immediately note upon it the time of filing and as soon as practicable, must record it in a book to be kept by him indexed to the names of judgment debtors. *Id.* § 2470.

Security. Before entering upon his duties the receiver must execute and file with the clerk of the court where the proceedings are pending (*Code of Civil Procedure*, § 816), a bond to the people with at least two sufficient sureties in a penalty fixed by the judge making the appointment; condition for the faithful discharge of his duties as receiver. *Code of Civil Procedure*, § 715.

An order appointing a receiver is not void because it directed that a bond with one surety be given; it may be amended so as to require two sureties without prejudice to proceedings already taken. *Holmes v. McDowell*, 15 *Hun*, 585; *aff'd*, 76 *N. Y.* 596.

The filing of the receiver's bond is necessary to the completion of

Note on Appointment of Receiver in Supplementary Proceedings.

the appointment. *Banks v. Potter*, 21 *How. Pr.* 469; *Conger v. Sands*, 19 *Id.* 8; *Voorhees v. Seymour*, 26 *Barb.* 569, 582; *Lottimer v. Lord*, 4 *E. D. Smith*, 183; *West v. Fraser*, 5 *Sandf.* 653; *Wilson v. Allen*, 6 *Barb.* 543. But when the receiver has given ample security upon his first appointment, there can be no occasion for requiring him to give security over again in every proceeding which may be afterwards instituted. *Banks v. Potter*, *supra*. But see *Conger v. Sands*, 19 *Id.* 8.

The court or judge making the order by which the receiver was appointed or his successor in office may at any time direct the receiver to give a new bond, with new sureties, with the like condition. *Id.*

It is discretionary with the court whether to require a receiver to give new security when one of his sureties has become insolvent. *Haulenbeck v. Heacock*, 47 *N. Y. Super. Ct.* 533.

The bond must be joint and several; it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect, that he is a resident of, and a householder or freeholder within the State, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law, from levy and sale under an execution (*Code of Civil Procedure*, § 812); it must be acknowledged or proved and certified in like manner as a deed to be recorded (*Id.* § 810), and must be approved by the judge before whom the proceeding is taken, and such approval must be indorsed upon the bond (*Id.* § 812). The receiver need not join in the bond (*Id.* § 811.)

In *Morgan v. Potter* (17 *Hun.* 403), it was held that none but the judgment debtor could take advantage of the fact that the bond lacked a seal. See also *Underwood v. Sutcliffe*, 10 *Hun.* 453.

Removing receiver. The court, or the judge who made the order appointing the receiver, or his successor in office, may at any time remove the receiver (*Code of Civil Procedure*, § 715); but before the court can entertain a motion for the removal of a receiver due notice in writing must be given of the motion, setting forth the grounds upon which the removal is sought. *High on Receivers*, § 824; *Campbell v. Spratt*, 5 *N. Y. Weekly Dig.* 25; *Bruns v. Stewart Man'g Co.*, 31 *Hun.* 195.

An order removing a receiver on the ground that his appointment was collusive is discretionary and not appealable to the court of appeals. *Connolly v. Kretz*, 78 *N. Y.* 629.

A motion to set aside an order appointing a receiver in place of one resigned is properly made to the court. *Lippincott v. Westry*, 6 *N. Y. Civ. Pro.* 74.

McBlane v. Speelman.

Effect of appointment on proceedings. The appointment of a receiver after the examination has continued for a time does not *per se* operate as a discontinuance of the proceedings. *People ex rel. Fitch v. Mead*, 29 *How. Pr.* 360. The judge does not by the appointment of a receiver lose jurisdiction of the judgment debtor nor the authority to punish a contempt on the part of such debtor in refusing to answer on further examination (*Id.*); and where the debtor fails to appear, on a day he is ordered to do so, a receiver may at that time be appointed and the debtor also punished for contempt. *Sickels v. Hanley*, 4 *Abb. N. C.* 231.

Where an order is issued restraining a third person from disposing of property in his possession belonging to the judgment debtor "until further order in the premises," an order appointing a receiver is such further order; it is the final order in the proceedings, and any restraint thereafter desired should be inserted in that order. *Court of Appeals*, April 1878, *People ex rel. Morris v. Randall*, 73 *N. Y.* 416.

McBLANE AS ASSIGNEE, ETC., v. SPEELMAN.

SUPREME COURT, YATES COUNTY CIRCUIT, JUNE, 1884.

§§ 635 *et seq.*, 682.

Attachment.—Questioning validity in collateral action.—Assignment for benefit of creditors.—When complete.

The provisions of section two of the general assignment act of 1877, requiring an assignment for the benefit of creditors to be recorded is mandatory, and title to the assigned property does not pass to the assignee until it is recorded.

The sufficiency of the affidavits on which an attachment is issued is not a jurisdictional one to be raised to a collateral action.

Rennie v. Bean (24 *Hun*, 126); *Smith v. Boyd* (18 *N. Y. Weekly Dig.* 461), followed.

(Decided June, 1884.)

Motion to dismiss the complaint in an action to recover for personal property seized under an attachment.

McBlane v. Speelman.

The plaintiff, as assignee for the benefit of creditors brought this action to recover the value of certain personal property seized under an attachment issued against the property of his assignor intermediate the execution and acknowledgment of the assignment.

At the close of the case the defendant made this motion.

R. H. Stearn, for defendant and motion.

Chapter 348, Laws of 1860, and chapter 466, of Laws 1877, are mandatory, regarding the requisites of an assignment, and no title to the assigned property passes to the assignee until the initial or essential requirements of the statute are complied with. One of these initial and essential requirements is the recording. *Rennie v. Bean*, 24 *Hun.* 123; *Smith v. Boyd*, 18 *N. Y. Weekly Dig.* 461; *Button v. Lorentz*, 45 *N. Y.* 510; *Hardman v. Bowen*, 39 *Id.* 196; distinguished 82 *Id.* 496; *Jarland v. Rathbone*, 39 *Id.* 369; *Royer Wheel Company v. Fielding*, 31 *Hun.* 274; *Lowery v. Clinton*, 19 *N. Y. Weekly Dig.* 191; *Fairchild v. Gwynne*, 16 *Abb. Pr.* 23; *Cook v. Kelly*, 14 *Id.* 466; *Keilly on Assignments*, 18-24, 118-121, 132; *Burrill on Assignment*, 20, 21, 40.

It has been held that section 682, of the Code of Civil Procedure does not limit persons who have acquired subsequent liens upon or interest in attached property, to move to set aside attachment, but includes one who claims under a voluntary transfer. *Trow's Printing Co. v. Hart*, 85 *N. Y.* 500.

A receiver of an insolvent national bank appointed after the issuing of an attachment against it, may, under the Code of Civil Procedure section 682, move to vacate an attachment without being a party to the action. *National Shoe & Leather Bank v. Mechanics' National Bank*, 89 *N. Y.* 440; *Jacobs v. Hogan*, 85 *Id.* 243. Even when there was an irregularity in the

McBlane v. Speelman.

judgment upon which the motion to vacate the attachment was made, the court held the judgment sufficient to confer jurisdiction until set aside. *Stubben Co. Bank v. Alberger*, 78 *N. Y.* 252. After the proceeds had been applied, plaintiff and the assignors are too late to move to vacate or modify (*Code Civil Pro.* § 682). The reading of this section would seem to be all sufficient, but even this section has been construed in cases other than those already cited. *Vide*, *Woodmansee v. Rogers*, 82 *N. Y.* 88; *Parsons v. Sprague*, 3 *N. Y. Civ. Pro.* 390; *Market Nat. Bank v. Pacific Nat. Bank*, 30 *Hun*, 50.

The attachment stands, whether good or bad originally, and cannot now be disturbed in that proceeding or in this. *Denman v. McGuire*, 17 *N. Y. Weekly Dig.* 504, and cases cited; *Stevens v. Middleton*, 14 *Id.* 126. An attachment may be amended and in this way existing defects cured. *Kibbe v. Wetmore*, 31 *Hun*, 424.

The judgment may be proven to show that plaintiff's claim, in the attachment proceeding, is a valid and existing claim. *Rinchev v. Stryker*, 28 *N. Y.* 45; *Coffin v. Stitt*, 19 *N. Y. Weekly Dig.* 22, 23; *Cribbins v. Freer*, 93 *N. Y.* 93; *Shoemaker v. Spencer*, 54 *Id.* 366; *Carr v. Van Hoesen*, 26 *Hun*, 316. Should it be held that plaintiff can raise that question collaterally in this action, then it is urged that the county judge had jurisdiction to issued the warrant. *Conkling v. Dutcher*, 5 *How. Pr.* 386; *Kissock v. Grant*, 34 *Barb.* 144.

The granting of the attachment is greatly a matter of discretion, and if granted upon any facts at all it should not be disturbed. *Ruppert v. Haag*, 1 *N. Y. Civ. Pro.* 411; *Allen v. Meyer*, 73 *N. Y.* 1; *Van Alstine v. Errwine*, 11 *Id.* 340; *Lamkin v. Douglas*, 27 *Hun*, 517; *Crandall v. McKay*, 6 *Id.* 483.

The answer in this case sets up the attachment, and acts done by virtue of it as a justification, and the

McBlane v. Speelman.

defense is a good one. *Day v. Beach*, 87 *N. Y.* 57; *Jacob v. Hogan*, 85 *Id.* 243; *Rinchey v. Stryker*, 28 *Id.* 45; *Hall v. Stryker*, 27 *Id.* 596; *Hull v. Munger*, 5 *Lans.* 102; *Miller v. Adams*, 7 *Id.* 134; *Brown v. King*, 11 *Hun.* 250; *aff'd*, 75 *N. Y.* 609; *Savacool v. Boughton*, 5 *Wend.* 170; *McGuire v. Herrick*, 5 *Id.* 240; *People v. Warren*, 5 *Hill*, 440.

J. E. Bean, for plaintiff, opposed.

ANGLE, J.—By section 1 of the assignment act of 1860 (Laws of 1860, p. 594), it is enacted that assignments shall be in writing, shall be acknowledged and the certificate of acknowledgment indorsed thereon before delivery to the assignee. Section 2 providing for the inventories, or schedules, and their verification; section 3 for the giving of a bond by the assignee; section 4 for an accounting; section 5 for compelling an assignee to perform decrees and orders; and section 6, requiring an assignment to be recorded, appear to have been regarded as directory only.

Chapter 466, Laws of 1877, p. 543, repeals § 28 of the above act of 1860, and makes a more detailed system. It is entitled “An act in relation to the assignments of the estate of debtors for the benefit of creditors.” Section 1 simply provides that the act may be cited as the general assignment act of 1877. Section 2 enacts that assignments shall be in writing, shall be duly acknowledged, and shall be recorded in the county clerk’s office of the county where the debtor resided or carried on business at the date of the assignment.

Another sentence in the same section provides that when real property is assigned which is situate in another county than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated.

McBlane v. Speelman.

The concluding sentence of the section declares that the assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in, or at the end of, or indorsed upon the assignment, before the same is recorded, and if separate from the assignment, shall be duly acknowledged.

The attachment under which the defendant levied upon the property, was issued intermediate to the writing and acknowledgment of the assignment, and the question is presented whether the recording of the assignment is requisite to give title to the assignee in a case where he has taken actual possession before it is recorded? All the provisions in section 2 are certainly not prerequisites to the assignment becoming effective, especially the one requiring a certified copy to be filed and recorded in another county when there is real estate situate in such county. But for this statute the assignment would have been sufficient without recording or acknowledgment by the assignor. One author appears to have been of the opinion that under the act of 1860, the title passed to the assignee from the date of the recording (*Keilly on Assignment*, 118-121). The opinion of the general term in *Rennie v. Bean*, 24 *Hun*, 126, is directly to the point that the provision in regard to recording is mandatory, and compliance with it is requisite to a valid assignment. And such, too, seems to have been the opinion of the New York common pleas in *Smith v. Boyd*, 18 *N. Y. Weekly Dig.* 461, 462, and my decision in the present case must conform to such opinions. The counsel for the plaintiff, however, insists that the affidavit on which the warrant of attachment was issued was not sufficient to give jurisdiction to the officer who issued it. The affidavit is defective, and would not for a moment stand against a motion made at the proper time to set the attachment aside; but the sufficiency of the affidavit on which the attach-

 Reis v. Rhode.

ment is issued is not a jurisdictional question to be raised in a collateral action (Matter of Griswold, 13 Barb. 412; Carr v. Van Hoesen, 26 Hun, 316). I am, therefore, unable to concur with plaintiff's counsel as to his right here to raise the question on the affidavit. Defendant must have judgment in his favor.

REIS ET AL., RESPONDENTS, v. RHODE ET AL.,
APPELLANTS.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL
TERM, JUNE, 1884.

§§ 603, *et seq.*, 1948, *et seq.*

Injunction.—Power of court to grant, restraining interference with acting trustees of religious corporation by rival claimants of the office.—When granted.—Determination of titles of claimants to office of trustees of religious corporations.—*Prima facie* evidence of election.

The title of rival claimants to the office of trustee of a religious corporation cannot be determined in an equitable action brought by one claimant or set of claimants against another claimant or set of claimants; [4] the remedy is by an action brought by the attorney general in the name of the people. [6]

The supreme court has jurisdiction to restrain those claiming to be the trustees of a religious corporation out of possession,—in an action brought by rival claimants to the office in possession,—from interfering with the property, records and seals of the corporation in the possession of acting trustees, until the claimants out of possession establish their title to the trusteeship in an action brought for that purpose. [12]

A certificate of the election of trustees of a religious corporation is not *prima facie* evidence of their election unless it is signed by both of the officers who presided at the election. [1]

Where persons claiming to have been elected and acting as trustees

Reis v. Rhode.

of a religious corporation are recognized as such by the religious organization and by a majority of those in office at the time of the election, rival claimants to the office, not having statutory evidence of their election, should be enjoined from interfering with them until the determination of their legal rights in the proper forum.^[2,3]

People v. Mattier (2 *Abb. N. S.* 239);^[5] *People v. Conkling* (5 *Han.* 452);^[6] *Mickles v. Rochester City Bank* (11 *Paige*, 118);^[6] *Tappan v. Gray* (3 *Edw. Ch.* 452);^[7] *Mayor v. Conover* (5 *Abb. Pr.* 171);^[7] *Mott v. Conually* (50 *Barb.* 516);^[7] *Coulter v. Murray* (15 *Abb. N. S.* 129);^[7] *Morris v. Whelan* (11 *Abb. N. C.* 64; *S. C.*, 64 *How. Pr.* 109);^[7] *Palmer v. Foley* (14 *How. Pr.* 308);^[7] distinguished. *Johnson v. Jones* (23 *N. J. Eq.* 216);^[8] *Featherstone v. Cook* (*L. R.* 16 *Eq.* 298);^[9] *Lutheran Ev. Ch. v. Gristan* (34 *Wisc.* 328);^[9] *Ewing v. Thompson* (43 *Pa. St.* 372);^[10] followed.
(Decided October, 1884.)

Appeal from order Onondaga special term denying motion to vacate injunction which restrained the defendants until the further order of the court from in any way interfering with the plaintiffs in the use, enjoyment and possession of the church edifice or interfering with the individual plaintiff in acting as trustees, and also restraining defendants from acting as trustees.

This action was brought by Herman Reis, Jr., and others claiming to be trustees of the Evangelical Lutheran Church of St. John, to obtain an injunction restraining the defendants, who also claim to be trustees of said church, from interfering with their possession and use of the church property, and from acting as trustees. The church was made a party plaintiff. Farther facts are stated in the opinion.

Goodelle & Nottingham, for defendants-appellants.

Lewis Marshall, for plaintiffs respondents.

Reis v. Rhode.

MERWIN, J.—The number of the trustees of the corporation plaintiff was seven. Prior to December 18, 1883, the offices of four of them had been judicially declared vacant. The office of one more expired January 1, 1884. For the purposes of filling these vacancies existing and to exist, an election was in proper form called for December, 18, 1883. Two elders were chosen as presiding officers, and they under the statute were the persons to certify as to the result of the election. The defendants claim they were elected, and one of the presiding officers so certifies.

The plaintiffs, Reis, Korb, Wigand and Schwartz, claim that they and one Oswald were elected, and one of the presiding officers so certifies.

Under the statute* both presiding officers must join in the certificate in order to furnish to the party the *prima facie* evidence of election that the statute provides for. So that in the present case neither party has the statutory evidence of election.

The defendants base their claim upon the fact that they were orally declared elected. Still the force of such declaration, if there was one, depends upon the surrounding circumstances, about which there is a dispute, and it is not what the statute makes *prima facie* evidence.

Both sides concede that the question as to who in fact were elected cannot be tried in this action. That being so, will this court by injunction control the possession?

Of the three in office at the date of the election one was the plaintiff Reis, whose term expired on January 1, 1884, and who claims to have been re-elected and who would hold over in case there was no election. Of the other two, one sides with the plaintiff, and the other with the defendant. The pastor of the

* Laws of 1813, chap. 60, §§ 3, 6.

Reis v. Rhode.

society, the vestrymen, and one of two elders recognize the plaintiff as properly elected. So that it is to be assumed that the religious organization sides with the plaintiffs. The question then would be whether, in the absence of the statutory evidence of election, that party which is recognized by the religious organization and by the majority of those in office at the time of the election should not also be recognized by the courts until the determination of the legal right in the proper forum.

Were the election entirely invalid, or had there been no election at all, the control by the trustees then in office would have been substantially as the plaintiffs now desire it to be. The main object of a religious corporation is the religious culture of the society connected with it; and that will be better subserved by harmony between the religious and temporal organization.

This seems to be a case calling for equitable interference (2 *High on Injunction*, § 315; *Kerr v. Trego*, 47 *Pa. St.* 292-296; *Lutheran Ev. Ch. v. Gristgan*, 34 *Wisc.* 328, 336); not on the ground, as stated in the injunction order, that the individual plaintiffs were duly elected, but on the ground that they were recognized by the authorities then existing—temporal and spiritual—and should not be interfered with by those not having statutory evidence of election, and not having their right established at law. As was said in *Kerr v. Trego*, the confusion that would be caused by two opposite parties pretending to act as the society should be stayed.

It follows that the order appealed from should be affirmed.

FOLLETT, J.—[Concurring.]—The title of rival claimants to the office of trustee of a religious corporation cannot be determined in an equitable action

Reis v. Rhode.

['] brought by one claimant or set of claimants against another claimant or set of claimants.

The remedy is by an action brought by the attorney general in the name of the people (*Code Civ. Pro.* §§ 1948-1956, 1984; *Hartt v. Harvey*, 32 *Barb.* 55; *The North Baptist Church v. Parker*, 36 *Id.* 171). Such is the rule in respect to all contested corporate elections except as it is otherwise provided by statute (*People v. A. & S. R. R. Co.*, 57 *N. Y.* 161, 171, 172.)

This action was not brought to determine the title of the rival claimants to the trusteeships, but to restrain the defendants who are out of possession from forcibly divesting the plaintiffs of their possession of the property and records of the corporation. No case has been cited in which the courts of this State have determined whether an injunction may be issued for this purpose.

People v. Mattier (2 *Abb. N. S.* 289), and *People v.*

['] *Conkling* (5 *Hun.* 452), relied upon by the defendants, hold that trustees *de facto* of corporations will not be restrained from continuing to act as trustees during the pendency of actions to try their title to the trusteeships. *People v. Mather* arose out of a contest for the control of the New York State Inebriate Asylum, and *People v. Conkling* arose out of a contest over the control of a savings bank. *Mickles v. Rochester*

['] *City Bank* (11 *Paige*, 118), holds that acting trustees of a manufacturing corporation will not be restrained from acting because the validity of their election is questioned in a suit by a stockholder to wind up the corporation, especially when it is not alleged that the trustees are irresponsible, or that they are wasting the property of the corporation.

The rule that acting trustees will not be restrained from continuing to act at the suit of rival claimants out of possession, affords no support to the defendants' contention that the court is without power to restrain claimants out of possession from interfering with the

Reis v. Rhode.

property of the corporation in the possession of acting claimants.

Tappan v. Gray, 3 *Edw. Ch.* 452; rev'd 9 ["] *Paige*, 507; aff'd 7 *Hill*, 259; Mayor v. Conover, 5 *Abb. Pr.* 171; Mott v. Connally, 50 *Barb.* 516; Coulter v. Murray, 15 *Abb. N. S.* 129; Morris v. Whelan, 11 *Abb. N. C.* 64; S. C., 64 *How. Pr.* 109; and Palmer v. Foley, 44 *How. Pr.* 308; aff'd, 36 *N. Y. Super.* (4 *J. & S.*) 14; S. C., 45 *How. Pr.* 110, all arose out of contest, for municipal offices, and, with the exception of Palmer v. Foley, all hold that claimants of municipal offices will not, in suits brought by rival claimants, be enjoined from acting. These cases have little bearing upon the question now presented.

The policy of this State has been not to permit citizens to control the actions of public officers by suits brought in their own name or interest, except pursuant to enabling statutes. Religious corporations are in no sense governmental, and cannot be, under our constitution. Such corporations consist of their members who own and, through their trustees, control the property (*Robertson v. Bullions*, 11 *N. Y.* 243; *Gram v. Prussia, &c. Society*, 36 *Id.* 161).

The chief distinction between such corporations and business corporations is that there are no stockholders, and that they are organized not for profit but for the improvement of society. They are subject to the control of their members like private corporations.

In New Jersey, where it is held, as in this State, that a court of equity is without jurisdiction to ["] determine the rights of rival claimants to offices in corporations, it was said (*Johnson v. Jones*, 23 *N. J. Eq.* 216, 226), "If the question of the legality of an election, or whether a certain person holds such an office, arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire into and decide it as it would any other question of

Reis v. Rhode.

law or fact that arises in the cause. But the decision is only for the purpose of the suit; it does not settle the right of the office or vacate it if the party is in actual possession."

The case last cited was brought by a railroad corporation and several of its directors to restrain persons claiming to be directors from interfering with the property of the corporation, in which an injunction was granted and sustained.

In *Featherstone v. Cooke* (*L. R.* 16 *Eq.* 298), it was held that the existence of disputes between members of the governing body of a company, preventing its affairs from being carried on properly, is a sufficient ground for an injunction restraining directors out of possession from interfering with the property of the corporation in the possession of acting directors.

In *Lutheran Evangelical Church v. Gristan* (34 *Wis.* 328), this question is fully discussed, and it is held that an action in equity to restrain the actions of claimants to trusteeships whose title to office is contested may be maintained.

In *Ewing v. Thompson* (43 *Pa. St.* 372, 379), an injunction restraining a claimant of the office of sheriff who was out of possession, from interfering with a claimant of the office, who was in possession, was granted and sustained, pending the determination of an action at law to determine who was legally elected. In *Kerr v. Trego* (47 *Pa. St.* 292), the doctrine of the last case was again asserted. It was said, "If a private partnership or corporation were to fall into a similar confusion, affecting all its members and all its creditors, we can think of no better remedy than this (an injunction) for staying the confusion that would be caused by two opposite parties pretending to act as the society. It is the very remedy usually adopted when churches divide into parties, and we applied it in three such cases in the last year. Therein we de-

Reis v. Rhode.

cided directly on rights of property, because that became the aim of dispute. Here we must decide on the right to public functions, because that is here for the purpose of the dispute. The main question in all such cases is regularity of organization, and the right to functions and property is a mere consequence of this. May one of the conflicting bodies or the members of it maintain this action (an equitable one for an injunction) against the other? We think they may. This could not be doubted in relation to private corporations and partnerships. But it is argued that in relation to public corporations the attorney general alone can file such a bill. We do not think so. It is right for those to whom public functions are intrusted, to see that they are not usurped by others. Either of these bodies has the right to demand of the courts that it and the interests of the public alleged to be committed to it shall be protected against the usurpation of others" (47 Pa. 296).

The Pennsylvania cases go further than the cases in this State in asserting the jurisdiction of a court of equity, and much further than is necessary to sustain the jurisdiction of this court over this case.

The case last cited distinctly asserts the jurisdiction of a court of equity to control the action of contending trustees of churches and private corporations.

A legal action in a court of law is the appropriate mode of determining the right of possession or title of rival claimants to real property; but when a claimant out of possession threatens waste, or an irreparable injury, a claimant in possession may maintain an action to restrain, and in such and like cases the right of possession or title may be determined in so far as it may be necessary to determine the action.

If this court has not jurisdiction of such an action with the power of restraint, the seal, records, temporalities and franchises of such corporations are exposed

Feely v. Manhattan R. Co.

to the hazards incident to frequent and perhaps violent changes in possession ; the control finally resting with the claimants possessing the most temerity, physical force and pertinacity, and thus exposing to destruction, by the feuds of contending claimants, the rights of individual corporators and every interest which the corporation was organized to promote, besides engendering a multiplicity of suits.

We think this court has jurisdiction to restrain the claimants of trusteeships out of possession (in [?] an action brought by a religious corporation and the trustees in possession) from interfering with the property, records and seal of the corporation in the possession of acting trustees until the claimants out of possession establish their title to the trusteeship in an action brought for that purpose. To this extent the injunction in this case should be sustained.

HARDIN, P. J., concurred.

FEELY, RESPONDENT, v. THE MANHATTAN RAILWAY COMPANY, IMPEADED, ETC., APPELLANTS.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM, DECEMBER, 1884.

§ 531.

Bill of particulars.—Instance of case in which ordered.

Where, in an action against an elevated railroad company for damages to real property of the plaintiff by the construction, maintenance and operation of the road, the answer alleged as a defense, "that the plaintiff is barred by his own negligence, acquiescence and the lapse of time from maintaining this action,"—*Held*, on appeal that an order requiring the defendant to furnish a bill of particulars of this defense should be affirmed.

(Decided December 1, 1884.)

Feely v. Manhattan R. Co.

Appeal from order requiring defendant to serve bill of particulars.

This action was brought against the Manhattan Railway Company as lessee and the Metropolitan Elevated Railway Company as owner of the Second Avenue Elevated Railroad in the city of New York, by one owning real property fronting upon Division street in said city, for damages to such property, and its easements, by the defendant's construction, maintenance and operation of their elevated railway through said street. The answer of the Manhattan Railway Company contained the following defense, with others: "And for a tenth defense this defendant alleges: that this plaintiff is barred by his own negligence, acquiescence and the lapse of time, from maintaining this action."

The plaintiff moved for a bill of particulars of this defense on an affidavit, the material part of which was as follows: "I know of no acts or omissions whereby I have manifested any acquiescence in or been guilty of any negligence in regard to the construction and operation of the defendant's railway in Division street, or whereby I am barred from maintaining this action; and I am advised by my said counsel and I verily believe that I shall be greatly embarrassed and impeded upon the trial of this action unless I am fully informed of the acts and omissions referred to in the allegations in the tenth defense in the answer of said defendant as barring me from maintaining this action by my own negligence, acquiescence and the lapse of time." A bill of particulars was ordered by Judge TRUAX, and the defendant appealed.

William A. Duer, for defendant-appellant.

The affidavit is insufficient. *Orvis v. Dana*, 1 Abb. N. C. 268. This is a fishing expedition. *Higginbotham v.*

Cornwell v. Dickel.

Green, 25 *Hun*, 216 ; Gee v. Chase Manufacturing Co., 12 *Id.* 630 ; Work v. Fair, 5 *Robt.* 694. A general averment of negligence is sufficient. Oldfield v. N. Y. C. & H. R. R. Co., 14 *N. Y.* 310 ; Knowlton v. Western R. R. Co., 15 *Id.* 444.

Roger Foster, for the plaintiff-respondent,—Cited : Dwight v. Germania Life Ins. Co., 84 *N. Y.* 473 ; Tilton v. Beecher, 59 *Id.* 176 ; People *ex rel.* Swinburne v. Nolan, *N. Y. Daily Register*, July 7, 1882 ; Wilmour v. Pravion, 13 *Fed. R.* 2, 386.

PER CURIAM (SEDGWICK, Ch. J., VAN VORST and FREEDMAN, JJ.)—Order affirmed with costs.

CORNWELL, RESPONDENT, v. DICKEL AND
ANOTHER, APPELLANTS.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
JANUARY, 1885.

District court in the city of New York.—*Right of party to be heard by counsel on submission of case.*

While a justice may in his discretion limit the time of a party's oral argument on the conclusion of a trial in a district court of the city of New York, he cannot deprive him of that right altogether.
(*Decided January, 1885.*)

Appeal from judgment rendered by Justice JOHN HENRY MCCARTHY in Seventh district court.

Upon the trial there was a disputed question of fact. At the conclusion of the testimony defendant's counsel asked permission to be heard upon the facts and the law. The justice declined to hear any argument.

Cornwell v. Dickel.

Defendant's counsel then asked permission to submit a written argument. This request was also denied, and judgment given for the plaintiff. An exception was taken to each of the rulings; and the defendants appealed.

Roger Foster, for defendants-appellants.

The defendants had the constitutional right to be heard by counsel (*Constitution of the State of New York*, Art. I. § 6; *Rex v. Chancellor*, 1 *Str.* 557; *Borden v. State*, 11 *Ark.* 519, 569; *Boswell's Lessee v. Otis*, 9 *How.* [U. S.] 336).

This right was denied them. *Chapman v. McCormick*, 86 *N. Y.* 479; *People ex rel. Cooper v. Nichols*, 79 *Id.* 582; Article in *N. Y. Daily Register*, Dec. 15, 1884.

P. Q. Eckerson, for plaintiff-respondent.

It is the invariable practice in district courts not to allow counsel to sum up, except in jury trials.

DALY, Ch. J.—[Orally.]—Although a justice may in his discretion limit the time of a party's oral argument he cannot deprive him of that right altogether.*

Judgment reserved, and a new trial ordered. Costs to abide the event.

LARREMORE and VAN HOESEN, JJ., concurred.

* See case cited by counsel for appellant, and *Graham's Practice* (3 Ed.) pp. 289, 290; *Elwell v. Chamberlain*, 31 *N. Y.* 611; *Hoxie v. Green*, 37 *How. Pr.* 97; *Murray v. N. Y. Ins. Co.*, 9 *Abb. N. C.* 309; sustaining this view of the subject. *Contra*, *People v. Cook*, 8 *N. Y.* 67 (57); *Baylies' Trial Practice*, 233.

Little v. Lynch.

LITTLE, AS RECEIVER, ETC., RESPONDENT, v. LYNCH,
APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
JANUARY, 1885.

§ 1019.

Referee's report.—What amounts to a sufficient delivery thereof to prevent reference being ended and entitle the referee to his fee.

A referee who, having his report ready for delivery, notified the attorney for the successful party within the sixty days allowed for its delivery, of that fact, and offered to deliver it upon payment of his fees, has thereby made a sufficient delivery thereof within the meaning of section 1019 of the Code of Civil Procedure, to prevent the reference being terminated and the forfeiture of his fees. [⁶, ¹¹, ¹³] *Little v. Lynch* (5 *N. Y. Civ. Pro.* 216), reversed; [⁶, ¹³] *Phipps v. Carman* (23 *Hun.* 150; *aff'd*, 84 *N. Y.* 650), overruled and distinguished; [², ⁵, ⁹] *Waters v. Shepherd* (14 *Hun.* 223); [¹, ⁷] *Cornelius v. Barton* (12 *N. Y. Weekly Dig.* 216); [³, ¹²] *Thornton v. Thornton* (66 *How. Pr.* 119); [⁴, ⁶, ¹⁰] *Geib v. Topping* (83 *N. Y.* 46); [⁸] followed. (*Decided January 8, 1885.*)

Appeal from order vacating and setting aside judgment entered on referee's report.

Reported below, 5 *N. Y. Civ. Pro.* 216. Sufficient facts are stated in the opinion.

Abram Kling, for defendant, appellant.

W. T. B. Milliken, for plaintiff-respondent.

BRADY, J.—This motion appears to have been made and granted upon the ground that the reference had been terminated before the filing of the report of the referee. It appears that the order of reference was entered upon the 5th of April, 1881, and that the

Little v. Lynch.

referee, upon the 18th of May following, made his final report in favor of the defendant, dismissing the plaintiff's complaint, and offered to deliver it to the defendant's attorney and said that he could have the same upon the payment of his fees; all of which was done within sixty days from the time of making the same. But the fees were not paid by the attorney.

A similar application to this was denied by the supreme court of the second district (*Waters v. ['] Shepherd*, 14 *Hun*, 223). In that case it appeared the referee made his report within the time limited by the statute, and on the same day gave notice to the attorneys for the plaintiff and the defendant that the report was ready for delivery. The report was not taken up, however, until after the expiration of sixty days, when the defendant served a notice in writing upon the referee and the plaintiff's attorney, that she elected to end the reference. The plaintiff's attorney, however, took the report from the referee and entered judgment upon it. The special term ordered the judgment to stand as having been regularly entered. The general term affirmed the order. It was held to be sufficient to comply with the terms of the statute that the report was made and the parties notified of its terms, and that it could be obtained on application to the referee. That decision rested upon section 273 of the Code then in force, which required the referee to make and deliver his report within sixty days from the time the action was finally submitted. The decision was made in May, 1878.

In December, 1880, the same department decided a similar question (*Phipps v. Carman*, 23 *Hun*, 150), ['] holding, however, that the binding force of *Waters v. Shepherd* was destroyed by the Code as altered since the decision therein was made, and the judgment of the court seems to have rested upon the change which was made by section 1019 of the *Code of*

Little v. Lynch.

Civil Procedure, to the effect that the report may be delivered to the attorney for one of the parties, or filed with the clerk within sixty days; and they declared that the referee would not have done his duty under the section unless he delivered his report to the clerk to be filed in case it was not taken up by one of the attorneys within the sixty days. That case was taken to the court of appeals and decided on the 11th of February, 1881. It was affirmed without any opinion, but upon the concurrence of all the judges.*

In the January preceding, however, the general term of this court, in the third department, in the ['] case of *Cornelius v. Barton* (12 *N. Y. Weekly Dig.* 216), held that where the referee had made his report and was ready to deliver it in the statutory time, but held it for the payment of his fees, there was a sufficient delivery to prevent the forfeiture of his fees on the termination of the reference under section 1019 of the Code. In that case it appeared that within a very few days after the cause was submitted, the referee notified the plaintiff's attorney that the report was in readiness to be delivered on the receipt of his fees. The court seems to have rested its judgment in that case upon the decision in *Geib v. Topping*, in the court of appeals (83 *N. Y.* 46). Subsequently the ['] case of *Thornton v. Thornton* (66 *How. Pr.* 119), was decided at special term, namely, in August, 1883, and it was held that where the referee makes his report within the statutory time and notifies the attorneys that his report is ready and at their disposal, and also of the amount of his fees, it should be deemed a sufficient delivery to prevent the forfeiture of his fees by the termination of the reference, under section 1019 of the Code of Civil Procedure. Justice HAIGHT, in delivering the opinion, said he was aware the decision

* See memorandum of decision in 84 *N. Y.* 650.

Little v. Lynch.

of Phipps v. Carman (*supra*), was in conflict with the conclusions at which he had arrived, and that the case had been affirmed in 84 N. Y., but stated that he was unable to concur in the opinion written in general term, and it seems for the reason that the general term of another department had held the other way—doubtless referring to the case of Cornelius v. Barton (*supra*). The learned justice also said that the court of appeals, it was true, affirmed the decision in Phipps v. Carman, but did not state the grounds upon which the decision was based, that there was a delay of two years in that case in filing the referee's report, and the case was distinguishable from the one under consideration by him.

The supreme court, in the second department, seems to have overlooked the provision authorizing [] the delivery of the report as an act which would prevent the operation of the statute, and destroy the right of parties to terminate the reference by giving the notice provided for, and to have held that the referee, if the report was not actually delivered to one of the parties, must file it in the clerk's office. It is quite apparent, from the reading of the statute, that it is complied with if he does deliver the report as one of the alternates declared, and if the notification under section 273 of the old Code, that the report was made and ready for delivery, was a delivery within the terms of that statute, it certainly is within the terms of section 1019 of the present Code. The filing, then, is not necessary, for the first alternate is accomplished. This view was not, it would seem, considered by the court of appeals upon the submission of Phipps v. Carman, because no opinion was delivered.

I think, therefore, in accordance with several cases, some of which are cited by Justice HAIGITT in his [] opinion in the case of Thornton v. Thornton (*supra*), that the report was constructively de-

Little v. Lynch.

livered by the referee in this case prior to the expiration of the sixty days and under the statute, and that the requirements of section 1019 of the *Code of Civil Procedure* were complied with.

The order appealed from should be reversed.

DANIELS, J.—[Concurring.]—The order was made upon the ground that the referee had failed to make and deliver his report within the time prescribed for that purpose by the Code, and that notice had been given on the part of the plaintiffs terminating the reference. But it was made to appear that the report of the referee was subscribed and ready to be delivered before the expiration of the sixty days mentioned in section 1019 of the *Code of Civil Procedure*, and that it was offered to be delivered to the defendant's attorney upon the payment of the fees of the referee. Such an offer was considered to be equivalent to an actual delivery of the report under section 273 of the *Code of Procedure*. That provided, as the present Code in effect does, that the referee should make and deliver the report within sixty days from the time the action should be finally submitted, and in default thereof, and before the report should be delivered, either party could serve notice upon the other that he elected to end the reference. Under that language, it was held, in *Waters v. Shepherd* (14 Hun, 223), [] to be sufficient to prevent the reference from being avoided or the report annulled, that it should be offered to be delivered within the sixty days, as this report was, to the attorney of one of the parties, upon the payment of the fees of the referee. And that was regarded as an accurate construction of this provision of the Code, as it was repeated in this section of the *Code of Civil Procedure*, in *Geib v. Topping* (83 [] N. Y. 46), where it was said that "the referee undoubtedly was not bound to part with the report

Little v. Lynch.

without payment of his legal fees, and where a referee has his report ready within the statutory time and offers to deliver it on payment of his legal fees, such offer should, we think, be deemed a sufficient delivery to prevent the forfeiture of fees declared by section 1019 of the *Code of Civil Procedure* (*Id.* 48).

It has been supposed, inasmuch as the legislature, by the enactment of section 1019 of the *Code of Civil Procedure*, authorized the report of the referee to be filed with the clerk within sixty days, that this [°] additional liberty prevented the other provision from being complied with by such an offer as was made in this case, and was sanctioned by the authorities already mentioned. This was held in *Phipp v. Carman* (23 *Hun*, 150), which was affirmed by the court of appeals (84 *N. Y.* 650). But that affirmation, as was stated by Mr. Justice HAIGHT in *Thornton v.* [°] *Thornton* (66 *How.* 119), may very well have proceeded upon the great delay appearing to have taken place before the referee's report was filed. There certainly was no good reason for holding that the language, standing by itself, which would permit a compliance with what it required to be done by an offer of the report upon the payment of the fees of the referee, should be deprived of its effect by the additional liberty given to file it with the clerk. That was not the form in which the section was enacted, but it declared that either might be done to maintain the force and effect of the report. It might, within the sixty days, "be either filed with the clerk or delivered to the attorney for one of the parties." The referee accordingly had his election to do one or the other of these acts, and either would comply with what the legislature has required. If he filed it with the clerk, that [°] would be sufficient. If he did not do that, then a delivery to the attorney for one of the parties would secure the preservation and validity of the re-

Little v. Lynch.

port. And no more was required to make this delivery to the attorney for one of the parties than had been when the same provision formed a part of the *Code of Procedure*. Consequently, what would have been a delivery of the report to an attorney for one of the parties under the *Code of Procedure*, would be equally as complete a delivery of it under this section of the *Code of Civil Procedure*. And so it was considered in *Geib v. Topping* (*supra*).

The same point arose in *Cornelius v. Barton* (12 ["] *N. Y. Weekly Dig.* 216), where this construction of the section was sustained by the court.

Certainly, as the enactment is precisely the same concerning the delivery of the report to the attorney in the *Code of Civil Procedure* as it was in the ["] *Code of Procedure*, what would constitute a compliance with the latter, should be held to be equally as effectual as the former. For the additional privilege secured to the referee of filing his report with the clerk in no manner tended to indicate what might be necessary to constitute a delivery to the attorney. Each delivery was separate and distinct. What was a good delivery under the same language employed in the *Code of Procedure* must necessarily be equally as good under the like phraseology in the *Code of Civil Procedure*.

The order should be reversed with the usual cost and disbursements, and an order entered denying the motion.

DAVIS, P. J., concurred.

Learned v. Tillotson.

LEARNED, APPELLANT, v. TILLOTSON, RESPONDENT.

COURT OF APPEALS, OCTOBER, 1884.

§§ 970-972, 1003, 1337.

Verdict of jury on specific question of fact in actions triable by court.—Power of court to disregard.—Evidence.—When letter may not be received in, on behalf of party who wrote it.—Appeal.—Reviewing facts on, in court of appeals.

It is well settled that, where, upon the trial of an action, there was a conflict of testimony as to an alleged fact, and there was no such preponderance in the evidence as would authorize the court in holding as a matter of law that it was established, upon an appeal to the court of appeals the facts are not reviewable.^[1]

The Code of Civil Procedure has not changed the rule that the verdict of a jury on special questions of fact submitted to it in an equity action is evidence only and not a determination of the issue, and can only be read on the hearing with full power in the court to follow or reject it as it might deem fit and proper.^[2, 3, 4, 8]

Section 972 of the Code of Civil Procedure which provides for the trial of actions in which specific questions of fact have been submitted to a jury, simply declares the law as it previously existed and works no alteration in the practice.^[4, 5, 7] The right and the power to try and determine all the issues in the case, could not be taken away without express words to that effect, and a clear intention manifested by an enactment to that effect;^[6] so great a change in the practice of a court of equity is not to be inferred and can only be sanctioned by clear and explicit provisions for that purpose.^[6]

Where, in an action upon an alleged copartnership agreement for an accounting, the question whether such an agreement was made was submitted to a jury and the jury answered the question affirmatively, and the defendant after the verdict of the jury made a motion for a new trial upon the minutes, which was denied, and thereafter, on a trial of the action before another judge at special term, the verdict of the jury and the evidence, etc., given before it were read in evidence, and the defendant again moved for a new trial of the question submitted to the jury, which motion was de-

Learned v. Tillotson.

nied, and the plaintiff gave other evidence of the terms of the agreement and the justice disregarded the verdict of the jury and found in favor of the defendant on the question submitted to the jury.—*Held*, no error:[^{2, 3, 4, 10, 11}] that the court could, upon a trial of the entire case, disregard the verdict of the jury and was not precluded from doing so by the denial of the motion for a new trial, upon the minutes.[⁹]

A letter from the plaintiff in an action, to the defendant, containing a statement of the plaintiff's claim written long after the alleged agreement sued upon was entered into, and which was not answered by the defendant cannot be regarded as a part of the *res gestæ* [^{11, 12}] and cannot be received in evidence on behalf of the party who wrote it; it is a mere declaration of the party in his own behalf which did not demand an answer and the silence of the party who received it cannot be considered as an admission of the truth of the statement made, or as binding upon him.[¹⁹]

Where, in such a case, it appeared that the plaintiff had a conversation with the defendant, subsequent to the receipt of the letter by him; as to which and the plaintiff testified, that in it the defendant admitted the receipt of the letter, and said that he did not remember making the agreement, and the defendant testified that he expressed surprise at the contents of the letter; asked an explanation of it and denied having made the agreement.—*Held*, that the letter was not answered in this conversation so as to render it admissible.[¹³]

Keen v. Priest (1 *Foster & Fin.* 314); [¹³] *Roe v. Day* (17 *Carr. & P.* 698); [¹⁴] *Gaskill v. Skene* (14 *Adol. & E. N. S.* [*Eng. Q. B.*] 664); [¹⁵] *Fenno v. Weston* (31 *Vt.* 345); [¹⁶] *Allen v. Peters* (1 *Phila.* 78); [¹⁷] distinguished; *Talcott v. Harris* (98 *N. Y.* 567); [²⁰] followed.

(Decided October 7, 1884.)

Appeal by plaintiff, from a judgment of the superior court of the city of New York, general term, affirming a judgment dismissing the complaint, rendered on a trial at special term.

Reported below, 48 *N. Y. Super.* (16 *J. & S.*) 239.

This action was brought for an accounting of profits made by defendant on certain purchases and sales of stock of the Silver Islet Consolidated Mining and Lands Company, alleged to have been made by defendant under an agreement, for a partnership venture

Learned v. Tillotson.

between him and the plaintiff with an equal division of profits.

The complaint alleged the agreement for the partnership venture, purchases of stock, under that agreement by the defendant, ignorance by the plaintiff of the amounts and prices of the purchase, and a refusal to account by the defendant.

The answer was substantially a general denial.

The issue whether the alleged agreement was made, was tried before a jury, and a verdict thereon was rendered in favor of the plaintiff.

A motion for a new trial of that issue, made upon the minutes of the presiding justice, was denied. A second motion for a new trial of that issue made at special term, before the justice before whom the remaining issues in the case were tried, was by him denied. The justice at the special term, after denying that motion, disregarded the verdict, found the fact as to the making of the agreement against the plaintiff and dismissed the complaint.

In addition to finding that the agreement alleged in the complaint was not made, the justice further found that "the defendant did not enter into . . . any agreement similar to it or of like effect with it."

The plaintiff and the defendant were both residents of Pittsfield, Mass., and in the summer of 1878 were intimate friends. The former had been engaged in mining for many years; since 1866 he had been in the habit of making an annual visit to the mines of the Silver Islet Company, of which his brother Edward was the president. He made the usual visit to Silver Islet in August, 1878, but before leaving Pittsfield had a conversation with the defendant, on his version of which he founds his claim. As to the time, place and words of this conversation, Learned and Tillotson were in conflict.

The plaintiff said: "During the seven days before

Learned v. Tillotson.

I left, I met him (Tillotson) on the east side of South street, in Pittsfield. . . . I said to him, I am going to Silver Islet in a few days, and during my stay there, if a deposit of rich ore—a bonanza—is found, I will telegraph you, provided you will buy the stock and give me one-half of all the profits, which he said he would do. . . . The conversation took about as long as I am now repeating it.”

The defendant denied the meeting and the conversation and said: “I met Mr. Learned in the drug-store. . . . As I was leaving the store, he said he was going to Silver Islet, and as I bid him good-bye, he said: ‘If anything turns up, I will let you know.’ I made no reply whatever that I recollect.”

Three years before, a “bonanza” had been struck at Silver Islet, but after yielding a million and a half in two years, it had given out, and when Learned left Pittsfield on August 2, 1878, the mine was poor, and the stock selling at \$5 per share.

While he was at Silver Islet another rich vein was struck, and on August 18, he telegraphed to Tillotson: “Buy Silver Islet stock immediately, as we arranged; mine immensely rich, unparalleled.”

After making inquiries as to the condition of the mine the defendant bought some stock, which is that for an accounting for the profits of which this action is brought.

On the trial the plaintiff offered in evidence the following letter which was excluded and an exception taken:

“Office of John C. Watson,
60 Devonshire Street, Boston,
Dec. 2nd, 1878.

“FRIEND TILLOTSON:

“In the Stock Board this afternoon fifty-three dollars was bid for Silver Islet certificates. As this stock is steadily advancing in price and as I may be disposed

Learned v. Tillotson.

to sell some stock before you are inclined to sell, or *vice versa*; I think it best that you should transfer to me my proportion of the stock you purchased as per the verbal agreement and understanding we made a short time before I left for Silver Islet last summer, which was as follows: that if the mine showed indications of being rich, during my stay at the Islet, I was to advise you to purchase Silver Islet certificates, which you agreed to do, giving me one-half of the profits accruing from the purchase and sale of such stock or certificates. This information furnished was my capital. During my stay a rich bonanza was found, and I telegraphed you to purchase Silver Islet certificates as per agreement; mine unparalleled. You did purchase (as you stated to me) three hundred shares or certificates, paying ten dollars per share for one hundred and twenty-five shares. The balance I can't say what you did pay for it. If you will calculate what your stock cost you, including interest and then multiply 300 shares by, say \$50 per share for example, and then deduct the cost of this stock, you will have the net balance. Now take one half of this net balance and divide it by \$50 per share and you will have the number of shares I am entitled to on this basis. An early reply will greatly oblige.

“I am very truly

“T. H. LEARNED.”

A conversation was thereafter had as to this letter between the plaintiff and the defendant in the latter part of December, at Pittsfield, Mass. The plaintiff's evidence as to which conversation was as follows:

“I had a conversation with him about these matters; I was in the club room, and I asked him if he had received my letter and he said he had; I asked him when he was going to give me my proportion of the stock according to our agreement, he said: ‘I do not remem-

Learned v. Tillotson.

ber having any agreement with you ;' said I 'Tillotson why do you say that ? Why did I telegraph to you about buying Silver Islet certificates unless I had an understanding with you ? I did it for this reason, that I had an agreement with you ; if I had not telegraphed you to get the stock the consequence would have been, that nobody could have got the stock, and I would have had to pay a very large price for it ;' I do not remember that he made any reply to it. As to his having made or not any agreement of any kind, he said he had not made any arrangement with me ; he used the words : that he did not remember making any such arrangement with me ; he said he had received the telegram ; he spoke as to his having bought the stock down at his mill, not at the club-room ; in answer to this point that I brought to his attention as to my having sent him the information, in preference to any other of my friends, I do not remember that he made any remark."

The defendant's evidence as to this conversation was as follows : " I spoke to Mr. Learned in relation to this letter I received from him and told him I was greatly surprised, it was a very funny letter and asked him to explain it, he said, it explains itself, he says he made a contract with me before he went out to Silver Islet ; I asked him where it was ; he said, down on the street, and I made a remark to Mr. Learned at that time : 'Tom what is the use of your lying to me ? You know we never had a conversation about purchasing stock ;' and he says 'keep your stock ; if you ain't a mind to give it to me, you may keep it.' "

Albert Stickney (Stickney & Shepard, Attorneys),
for plaintiff, appellant.

The exclusion of the letter of December 2nd was an error. The letter was admissible as a part of the *res gestæ*. The issue being whether or not there was any

Learned v. Tillotson.

agreement, there being no agreement in writing, and the evidence of the two parties as to whether or not there was any oral agreement being in direct conflict, it was necessary and admissible upon this issue, to give in evidence the entire history of the acts and communications of the parties, for the purpose of ascertaining which party told the truth. No one of those acts and communications is conclusive; each one is to be weighed, but all are . . . alike admissible. This entire series of acts and communications, as to this transaction between these two parties, constitutes the *res gestæ*. It is secondary and circumstantial evidence. It is admissible in the absence of conclusive primary evidence. . . . The letter is admissible as part of the *res gestæ* notwithstanding it contains the plaintiffs own declarations in his own favor. Citing *Greenleaf on Evidence*, § 108; 1 *Taylor on Evidence*, § 585; *Beaver v. Taylor*, 1 *Wall. (U. S.)* 637; *Milne v. Leisler*, 7 *Hurl. & N. (Eng. Excr.)* 786, 796; *Conn. Mutual Life Ins. Co. v. Lathrop*, 29 *Alb. L. J.* 429. Although the letter contains a statement as to the alleged agreement, made after the date when the agreement was made, it is still admissible as part of the *res gestæ*. Citing 1 *Taylor on Evidence*, § 588; *McCotter v. Hooker*, 8 *N. Y.* 497; *Palmer v. First Nat. Bank*, 4 *N. Y. Weekly Dig.* 268; *Jewell's Lessee v. Jewell*, 1 *How. (U. S.)* 219; *Commonwealth v. M'Pike*, 3 *Cush. (Mass.)* 181; *Commonwealth v. Hackett*, 2 *Allen (Mass.)* 136; *Tompkins v. Saltmarsh*, 14 *Sergt. & Raw. (Pa.)* 275; *Rawson v. Haigh*, 2 *Bing. (Eng. & P.)* 99; *Ridley v. Gade*, 9 *Id.* 349; *Roush v. Great Westn. R. R. Co.*, 1 *Q. B.* 51; *Thorndike v. City of Boston*, 1 *Metc. (Mass.)* 242; *Doe v. Arkwright*, 5 *Carr. & P. (Eng. N. P.)* 575. The only principal that can be laid on this branch of the law of evidence is, that every act or declaration of any party, which is a part of the history of the transaction under investigation, is admis-

Learned v. Tillotson.

sible as part of the *res gestæ*, as circumstantial evidence, in the absence of conclusive direct evidence and upon the precise point in issue. Citing *Hickler v. Leighton*, 70 *N. Y.* 610 ; *Fisher v. Mayor*, 67 *Id.* 73 ; *Twomley v. Cent. Park, &c. R. R. Co.*, 69 *Id.* 158 ; *Eager v. Crawford*, 76 *Id.* 97 ; *Shaw v. People*, 3 *Hun.* 272. Even if the letter was a mere unanswered letter, it was admissible. *Keen v. Priest*, 1 *Foster & Fin. (Eng. N. P.)* 314 ; *Roe v. Day*, 7 *Carr. & Pa. (Eng. N. P.)* 705. Taken however in connection with all the circumstances, the defendant's omission to answer the letter constituted an admission by conduct. Citing, *Greenleaf on Evidence*, §§ 197, 198 ; *Kelley v. People*, 55 *N. Y.* 565 ; *Le Bau v. Vanderbilt*, 3 *Redf.* 384, 399 ; *Gaskill v. Skene*, 14 *Adol. & E. N. S. (Eng. Q. B.)* 664 ; *Fenno v. Weston*, 31 *Vt.* 345 ; *Allen v. Peters*, 4 *Phila.* 84. The letter, however, was answered in the subsequent conversation, and was admissible for that if on no other ground. It is an ordinary occurrence to prove statements of a party for the purpose of showing that he knew them to be untrue, and thereby establishing against him a wrongful or fraudulent intent in making the statements. *Coleman v. People*, 58 *N. Y.* 555, 560 ; *Platt v. Platt*, 58 *Id.* 649 ; *Dalton v. Woodman*, 9 *Cush. (Mass.)* 255. It was not within the power of the court to disregard the verdict of the jury It was an error for the court to go beyond finding against the contract pleaded in the complaint, and to find that the parties did not make any agreement similar to it or of like effect with it. We are unable to find any precedent for such a course. The findings in a case should cover only issues that are on the record and have been tried. It might have great weight against the plaintiff, in case he should be finally defeated in this action and should see fit to bring another action on a somewhat different agreement.

Learned v. Tillotson.

Joseph H. Choate and Henry A. Root (Root & Martin, attorneys), for defendant, respondent.

This court has no power to review the facts. *Code Civ. Pro.* § 1337; *Matter of Ross*, 87 *N. Y.* 514. It was contended in *Vermilyea v. Palmer*, 52 *N. Y.* 471, that under the Code of Procedure this court had power to examine and review questions of fact in an equity action, where a specific question of fact had been tried by a jury; and this court there held that it did not have that power. Their reasoning to support that decision (*Id.* 473), is appropriate to cases arising under the Code of Civil Procedure, except that the inhibition of the latter is express. The court at special term disregarded the verdict as unsatisfactory and found for itself against the plaintiff. This was within the court's power and wholly within its discretion. The issue is tried by the court, and not by the jury. The jury simply find on a question of fact. Their verdict is ancillary to the court's action; it is purely advisory; it is not conclusive. If it goes before the court, undisturbed, and no motion to set it aside is granted, the court can give that verdict such weight as it pleases; it can treat the verdict as conclusive and refuse or dispense with other evidence on the question submitted; it can demand or receive other evidence on that question, or it can disregard the verdict and find the fact for itself. Citing *Bootle v. Blundell*, 19 *Ves. Jr. (Eng. Chy.)* 494, 499; *Hampson v. Hampson*, 3 *Ves. & Bea. (Eng. Chy.)* 41, 42; *Basey v. Gallagher*, 2 *Wall. (U. S.)* 670, 680; *Watt v. Starke*, 101 *U. S. (11 Otto)* 247; *Colie v. Tift*, 47 *N. Y.* 119; *Birdsall v. Patterson*, 51 *Id.* 43; *Vermilyea v. Palmer*, 52 *Id.* 471; *Brinkley v. Brinkley*, 2 *T. & C.* 501; *aff'd in effect*, 56 *N. Y.* 192; *Smith v. Chasseand*, 1 *N. Y. Weekly Dig.* 117; *Miaghan v. Hartford Ins. Co.*, 12 *Hun*, 321; *Hatch v. Peugnet*, 64 *Barb.* 189. The Code of Civil Procedure has not changed the effect of special findings. . . . In the following

Learned v. Tillotson.

cases. decided since this Code went into effect, it has been laid down that the court at special term had power to disregard the verdict. *Ward v. Warren*, 15 *Hun*, 600; *aff'd*, 82 *N. Y.* 265; *Wallace v. American Linen Thread Co.*, 16 *Hun*, 404; *Madison University v. White*, 25 *Id.* 490; *Carroll v. Deimel*, 13 *N. Y. Weekly Dig.* 401. . . . It makes no difference in the effect of the verdict or in the value of our objections to it that our motions for a new trial had been denied. *Brown v. Clifford*, 7 *Lans.* 46; appeal dismissed, 54 *N. Y.* 636. . . . The letter of December 2, was admissible to prove a demand but incompetent as of the facts it stated. . . . It was simply plaintiff's declaration in his own favor. Citing *Waring v. United States Tel. Co.*, 4 *Daly*, 233; *Allen v. Peters*, 4 *Phila.* 78; *Anthorne v. Coit*, 2 *Hall*, 40; *Robertson v. Fitchburg R. R. Co.*, 7 *Gray (Mass.)* 92; *Hill v. Pratt*, 29 *Vt.* 119; *People v. Lockwood*, 3 *Hun*, 304; *Fairlie v. Denton*, 3 *Carr. & Pa. (Eng. N. P.)* 103; *Gaskill v. Skene*, 4 *Adol. & E. N. S. (Eng. Q. B.)* 664; *Richards v. Frankime*, 9 *Carr. & Pa. (Eng. N. P.)* 221; *Draper v. Crofts*, 15 *Mees. & Wels. (Eng. Excr.)* 166; *Talcott v. Harris*, 93 *N. Y.* 567, 571; *Meguire v. Corwin*, 3 *MacArthur, (D. C.)* 81; *Wright v. Doe ex dem. Totham*, 7 *Adol. & E. (Eng. Q. B.)* 313. . . . It was right for the court to find that no agreement was made of like effect with that alleged. The defendant is entitled to an adjudication that will put the whole controversy forever at rest. If plaintiff chose to allege one agreement and prove another, he must be barred as to both. The judgment is conclusive between the parties, not only as to all matters expressed in the pleadings, but also as to all matters which were litigated or might have been litigated in the action. *Patrick v. Shaffer*, 94 *N. Y.* 423, 430.

MILLER, J.—The plaintiff, in his complaint in this

Learned v. Tillotson.

action, demands that the defendant account for all purchases and sales made by him of certain stock of the Silver Islet Consolidated Mining and Land Company, under an alleged agreement for a co-partnership venture with an equal division of profits, by which the plaintiff was to furnish information as to the probable value, as a purchase, of the capital stock of said company, which information was to be used for the joint benefit of the plaintiff and defendant, and for all uses made by the defendant of such information furnished by the plaintiff.

The question whether a valid agreement was established between the plaintiff and the defendant, by which the defendant obligated himself to pay to the plaintiff a portion of the profits realized by him in the purchase of the stock of the Silver Islet Mining Company, involved a matter of fact for the consideration and determination of the judge at special term upon the trial of this action. The testimony of both the plaintiff and defendant, who were the principal witnesses in regard to the terms of the alleged agreement, was in conflict, and there was no such preponderance in the evidence as would authorize a holding, as a matter of law, that a valid agreement was established, by which the defendant was bound to render an account to the plaintiff for profits made, or for one half of the stock purchased by him by reason of such agreement. It is well settled that, under such circumstances, upon an appeal to this court the facts are not reviewable (*Code of Civil Procedure*, § 1337; *Matter of Ross*, 87 N. Y. 514; see also, *Vermyea v. Palmer*, 52 *Id.* 471).

In this case, however, it appears that a specific question of fact as to the existence of an agreement between the parties had previously been submitted to the jury upon the trial before the judge at special term, and a verdict rendered in plaintiff's favor, and that the

Learned v. Tillotson.

cause was subsequently tried by another judge upon oral testimony taken, as well as the testimony given upon the former trial contained in an exhibit, which was introduced in evidence, and the verdict previously rendered, and it is claimed by the appellant's counsel that it was not within the power of the court to disregard the verdict of the jury.

Under the practice of the court of chancery as ['] it formerly existed the rule undoubtedly was that the finding of specific issues, tried before a jury when ordered, was not a final determination of such issues. The verdict of the jury was not conclusive, and could only be read on the hearing with full power in the court to follow or reject it as might be deemed fit and proper. It was only a part of the evidence, and if for any reason it was deemed unauthorized, it could be rejected, and was not obligatory upon the court. The object of such a proceeding was ancillary to the action of the court and simply advisory. If the verdict was

not set aside the court was authorized to give it such ['] weight as it determined it was entitled to. It could treat it as entirely conclusive, and dispense with other evidence upon the issues presented, or it could allow other evidence to be given, or entirely disregard the verdict, and find the fact according to its own judgment (*Daniell's Ch. Pr.* 1146; *Bootle v. Blundell*, 19 *Ves. Jr.* [*Eng. Chy.*] 494, 499; *Hampson v. Hampson*, 3 *Ves. & Bea.* [*Eng. Chy.*] 41; *Basey v. Gallagher*, 20 *Wall.* [*U. S.*] 670, 680; *Watt v. Starke*, 101 *U. S.* 247; *Colie v. Tift*, 47 *N. Y.* 119; *Birdsall v. Patterson*, 51 *Id.* 43; *Vermilyea v. Palmer*, 52 *Id.* 471, 474).

The Code of Procedure did not change the rule ['] but left the verdict of the jury as evidence only and not a determination of the issue. It is claimed that the Code of Civil Procedure has changed the practice and has made the verdict of a jury in an equity case the final determination of the issue, and reliance

Learned v. Tillotson.

is placed upon the provisions of section 1003 of that Code, which provides for the reviewing of the verdicts of juries in both common-law and equity cases, and declares that "the provisions of this article relating to the proceedings to review a trial by a jury are applicable to the trial by a jury of one or more specific questions of fact arising upon the issues in an action triable by the court." It then refers to the special term as that court where "the remaining issues of fact are tried." The preceding section (972) which is also relied upon, contains words of a similar import and provides that "if the questions directed to be tried by a jury, as prescribed in the last two sections, do not embrace all the issues of fact in the action, the remaining issues of fact must be tried by the court or by a referee." If any change is made it is by virtue of [5] the section last cited, which, we think, simply declares the law as it previously existed, and works no alteration in the practice. The enactment that questions not submitted to a jury must be tried by the court is not a declaration that the question submitted to the jury must not be tried by the court. It simply provides in what manner the issues not tried shall be tried, leaving the issues which have been tried to be determined the same as formerly upon the final hearing. The right and the power to try and determine all the issues in [6] the case could not be taken away without express words to that effect and a clear intention manifested by an enactment for that purpose. So great a change in the practice of a court of equity is not to be inferred and can only be sanctioned by clear and explicit provisions for that purpose.

The claim urged, that the "remaining issues" are to be interpreted as meaning that the questions submitted to the jury no longer remain for trial, and are [7] finally disposed of by the verdict, is not, we think,

Learned v. Tillotson.

well founded. In the sense in which these words are used they simply mean the other issues which have not been tried, thus leaving it for the court to determine, upon the entire case, of which the verdict constitutes a part, the questions presented for trial. This construction is supported by the opinion of CHURCH, C. J., in *Vermilyea v. Palmer* (*supra*), where, after referring to 'he facts found by the jury, he speaks of the other facts as the "remaining facts." There is no provision in the Code of Civil Procedure as to the ['] effect of the verdict, and thus the law is left unchanged in this respect. This construction is also supported by the notes to sections 1003 and 972, in Throop's Edition of the Code. There is nothing, we think, in section 1225 of the Code, or in any other of the provisions relied upon, which sustains the position of the appellant's counsel.

The motion for a new trial upon the minutes, ['] after the verdict, and its denial does not, we think, preclude the court, upon a trial of the entire case, from disregarding the verdict. An examination of the various provisions of the Code leads us to the conclusion that the court at special term committed no error in this respect. Upon the trial it appears to have been conceded that the verdict was not conclusive, for the appellant submitted every question to the court, proved his whole case *de novo* by oral testimony, and introduced in evidence the verdict, the stenographer's minutes of the first hearing, including the judge's charge. In fact, the testimony tended to show an agreement which differed somewhat from that found by the jury. The whole case was thus tried, ['] and we are unable to discover that there was any rule of practice violated by the judge in disposing of the same.

Upon the trial at special term objection was made to the introduction in evidence of a letter from the

Learned v. Tillotson.

plaintiff to the defendant dated the 2d day of December, 1878, and the letter was excluded, except for the purpose of showing a demand by the plaintiff of the defendant of the stock claimed to belong to the plaintiff. This same letter was received in evidence upon the first hearing against the objection of the defendant, and an exception taken to the ruling. The letter in question contained a statement of the plaintiff's claim against the defendant, and it is insisted that it was admissible as a part of the *res gestæ*.

If the letter was competent it must be on the ground that it was a statement made by the plaintiff, which called for a response from the defendant, and none having been given, the silence of the defendant, and his failure to make any reply to the same was an admission of the accuracy of the statement made in the letter. The letter itself cannot be regarded as [1] coming within the rule that where a statement is made at the time when credit is given, as in an action for falsely representing the solvency of a stranger, proof may be given that the plaintiff trusted him in consequence of the misrepresentation, or as evidence of declaration in kindred cases accompanying the acts done, which constitute a part of the *res gestæ*. (1 *Taylor on Evidence*, § 585; *Beaver v. Taylor*, 1 *Wall. [U. S.]* 637; *Milne v. Leisler*, 7 *Hurl. & N. [Eng. Exer.]* 786, 796.)

The letter containing the statement as to the [2] transaction was written long after the alleged agreement was entered into, and cannot well be regarded as accompanying and constituting a part of the same. It was evidently an after-thought, intended to draw from the plaintiff, in response, a statement of his version of the transaction, and the evidence cannot be justified upon the ground that it was in the nature of a conversation had after the contract had been made, which contained statements as to what had taken

Learned v. Tillotson.

place at the time of the original contract, and hence was a part of the *res gestæ* within some of the authorities cited by the appellant's counsel. The statement was entirely *ex parte*, not made in the presence of the defendant, and, therefore, he was not in the position of one to whom a conversation is addressed, who is called upon at the time to make an answer to the same, or to suffer the consequences of such inferences as may be derived from the fact of his remaining silent, and thus acquiescing in the correctness of the representations made. Nor can it be said, we think, that the statement contained in the letter bears any analogy to a case where an injured party makes a statement after the transaction, which is held under certain circumstances in some of the authorities, to be competent testimony.

Some of the cases cited, to establish the admissibility of declarations in favor of or against the party making them, relate to the question of intent, and have no application to the case at bar (*Ridley v. Gade*, 9 *Bing.* [*Eng. C. P.*] 349; *Thorndike v. City of Boston*, 1 *Metc.* [*Mass.*] 242).

Other authorities are cited to sustain the position that the letter taken in connection with the defendant's silence and the subsequent interviews between the parties, was evidence, on the ground that it tended to establish an admission by the defendant. These cases have been examined, and we think none of them present the precise question now considered.

In *Keen v. Priest* (1 *Foster & Fin.* [*Eng. N. P.*] [?] 314), the letter then in question was from the plaintiff's attorney to the defendant demanding redress for "an illegal seizure of sheep," and it was admitted on the ground that it was evidence of the conduct of the defendant, of which silence was sometimes evidence. It will be seen that the case was one of a tortious nature and in this respect differs from an

Learned v. Tillotson.

action upon a contract, where the letter is offered to show the plaintiff's version of the contract and its admission by the mere silence of the defendant.

In *Roe v. Day* (7 *Carr. & P.* [*Eng. N. P.*] 393), [14] the letter introduced was the last of a written correspondence, and was competent for the purpose of showing all that passed between the parties. In *Gaskill v. Skene* (14 *Adol. & H., N. S.* [*Eng. Q. B.*] [15] 664), the letter was received in evidence, as being, in substance, a demand, and containing only such statements as might fairly accompany a demand. The remarks of COLERIDGE, J., evince that a mere *ex parte* statement in a letter, of the party's case, cannot be received as evidence upon the ground that it remains unanswered.

In *Fenno v. Weston* (31 *Wl.* 345), the letter in [16] question was introduced in evidence without objection, and constituted a portion of the correspondence between the parties and the question in reference to it was raised in regard to the charge of the judge. The precise point now made was not presented. There were no letters passing between these parties which authorizes the admission of the letter objected to as a part of the correspondence, and it does not appear that the defendant ever wrote to the plaintiff, or had any communication with him on the subject, except of an oral character.

In *Allen v. Peters* (4 *Phila.* 78), the decision [17] was based on the ground of a misdirection, or a want of full direction in the charge, and the question whether the letter was properly admitted was not decided and there is nothing in the opinion of the court which sustains the admissibility of a letter of the character of the one which was excluded under the facts presented in the case at bar.

Nor can it be said, we think, that the letter [18] was answered in the subsequent conversation

Learned v. Tillotson.

between the parties, which was given in evidence upon the trial, so as to render the letter admissible. Some other cases are cited by the appellant's counsel, but none of them hold, that a letter, written under the circumstances presented here, is competent evidence, of itself, against the party to whom it is addressed. On

the contrary, numerous authorities sustain the [12] position that a letter, written long after the transaction has taken place, stating the facts relating to the same, and the agreement of the parties, under ordinary circumstances, is a mere declaration of the party in his own behalf, which does not demand an answer, and that the silence of the party cannot be considered as an admission of the truth of the statement made and as binding upon him.

The question here discussed has been the subject of consideration in a recent decision of this court (*Talcott v. Harris*, 93 N. Y. 567, 571). In that case the [13] action was against a person who had been discharged in bankruptcy, and it was claimed that the discharge was invalid on the ground that there was fraud in the contract by the bankrupt. An order of arrest had been issued upon affidavits averring fraud in contracting the debt, and upon the trial the plaintiff introduced in evidence, against the objection and exception of the defendant, the papers upon which said order was granted. This court held that the evidence was erroneously received, and reversed the judgment. It was laid down in the opinion that "if the affidavits in question were competent evidence, it must be upon the ground that they were statements made by, or on behalf of the plaintiff, showing the fraud of the defendants, which were uncontradicted by the defendants and that they acquiesced in the propriety of the order and in the truth of the statements. . . . While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so

Learned v. Tillotson.

may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavit or otherwise, cannot be regarded as an admission of the correctness thereof and that it is true in all respects. Reasons may exist why he may choose and has a right to remain silent and to vindicate himself at some future period, and on some more opportune occasion." We are unable to see why the case cited is not directly in point. The affidavits constituted a statement by the plaintiff, which was not contradicted, no motion having been made to vacate the order of arrest, upon the ground that the facts were not true and no exception having been taken to the same. The facts are very similar in reference to the letter of the plaintiff in the case at bar, and if silence could be regarded as an admission of the correctness of the statement made, the same rule is applicable to each case and the decision last cited is controlling. Numerous other cases tend in the same direction (*Waring v. United States Tel. Co.*, 4 *Daly*, 233; *Anthorne v. Coit*, 2 *Hall*, 40; *Robinson v. Fitchburg & W. R. R. Co.*, 7 *Gray* [*Mass.*] 92; *Hill v. Pratt*, 29 *Vt.* 119; *People v. Lookwood*, 3 *Hun*, 304; *Fairlie v. Denton*, 3 *Carr. & P.* [*Eng. N. P.*] 103; *Draper v. Crofts*, 15 *Mees. & Wels.* [*Eng. Excr.*] 166; *Meguire v. Corwine*, 3 *MacArthur* [*D. C.*] 81).

From an examination of the cases, we think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party and a written statement in a letter, written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to

Learned v. Tillotson.

answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law. We think that the court on [?] the trial at special term, properly held that the letter was inadmissible except for the purpose of showing a demand, and that the judge, upon the previous trial of the issue, which was submitted to the jury, erred in receiving the same in evidence.

There was no error in any of the findings of the court, upon the trial, and the judgment should be affirmed.

All concur, except DANFORTH, J., absent.

INDEX.

	Page
ABATEMENT AND REVIVAL —Revival and continuance of action in case of death...	144
— May be by assignee of executor or administrator.....	144
— Effect on counterclaim set up in answer.....	144
ACCOUNTING —When petition for, of executor not denied on the ground of laches.....	85
— When accounting of executor, administrator or guardian should be opened.....	16
— When not opened.....	389
— See SURROGATE .	
ACTION —When party in interest not party to action may apply to court for protection of his interest.....	90
— Joinder of, for obtaining signature to bond by false representations with one for conversion.....	121
ADMINISTRATOR —See EXECUTOR AND ADMINISTRATOR .	
AFFIDAVIT —Who authorized to take without the State.....	263, 268
— Form of certificate to.....	117, 263, 268
— Effect of absence of such certificate on order for service by publication.....	117
— When absence of, of no prior application for order of arrest or warrant of attachment does not imperatively require vacation thereof.....	268
AGENT —See PRINCIPAL AND AGENT .	
ALIENS —Inherit the same interest in real estate as citizens, subject to be defeated by the State.....	326
ALLOWANCE —Basis of extra, in action for causing death...	222
— What is sufficient monetary basis for extra allowance.....	25
ANSWER —See PLEADINGS .	
APPEAL —From final judgment overruling demurrer brings up order overruling demurrer for review.....	121
— Power to amend complaint on.....	153

	Page
— When judgment not reversed where its correctness depends on credibility of witnesses.....	158
— Reducing judgment on.....	158
— When both parties request the direction of a verdict there is no question of fact to be reviewed by the appellate court.....	226
— What brought up for review by appeal from order, denying resettlement.....	74
— Report of commissioners in proceedings to acquire land for railroad purposes, how corrected.....	302
— See FINDINGS; COURT OF APPEAL; COURT OF COMMON PLEAS; JUSTICE OF THE PEACE; UNDERTAKING.	
APPEARANCE —What amounts to.....	117
— When order discontinuing action ineffectual, after special appearance of defendant.....	305
ARREST —When order of, not vacated where <i>prima facie</i> case is made out.....	263, 268
— When complaint or affidavit stating its contents, to be presented on application for order of.....	77
— When absence of affidavit of no prior application for order of, does not require vacation of the order.....	263
— Party to action when not liable for false arrest directed by his attorney.....	207
— See CONTEMPT; EXECUTION AGAINST THE PERSON.	
ASSIGNMENT FOR BENEFIT OF CREDITORS —When complete.....	401
— Necessity of recording ..	401
— See EXAMINATION BEFORE TRIAL.	
ATTACHMENT —When not vacated where <i>prima facie</i> case is made out.....	263, 268
— When defects in affidavit on which issued are not jurisdictional they cannot be raised in collateral action.....	401
— Instance of affidavit on which, granted held insufficient....	366
— When absence of affidavit of no prior application not fatal defect.....	268
— When will not lie.....	79
— Judgment or statutory liability not contract.....	79
— Mode of levying on promissory note, etc.	164
— Effect of prior fraudulent transfer	164
— Levy on instrument for payment of money made only by taking it into actual custody.....	164
— See PLEADINGS; COMPLAINT.	
ATTORNEY —Power of, to settle and discontinue action and satisfy judgment.....	315
— When liable for costs.....	294

INDEX.

447

Page

— See EVIDENCE; REFERENCE.

AUCTIONEER—Liability of sureties on bond of, given on grant of license in city of New York..... 238

— Suit on bond, by whom brought 238

BANKRUPTCY—Debt not discharged by discharge in, when creditor is fraudulently omitted from schedules..... 62

— When judgment not discharged of record on account of debtor's discharge in..... 148

BILL OF PARTICULARS—Stay in order for, to be vacated on service of..... 188

— When bill of particulars required in action by mutual benefit society against its late treasurer for moneys alleged to have been misappropriated by him or through his negligence..... 161

— When ordered in action by assignee against sheriff for conversion..... 330

— When ordered in action for damages to real property, of defense alleging negligence, and waiver..... 414

BOND—See AUCTIONEER.

BROKER—See PRINCIPAL AND AGENT; LIMITATIONS TO ACTION.

CERTIORARI—Assessors of town to be designated in, by individual names..... 297

— Effect of omission of seal..... 297

— Amendment of, when seal omitted 297

CITY COURT OF NEW YORK—What counterclaims may be pleaded in action in, brought by executor..... 357

— See COURT OF COMMON PLEAS; JUDGMENT.

COMPLAINT—See ARREST; PLEADINGS.

CONTEMPT—Power to punish for, is branch of common law.. 43

— When criminal, punishable civilly..... 250

— Form of warrant of commitment 250

— Punishment; amount of fine..... 43, 350

— Review of adjudication in proceeding to punish for..... 350

— Perjury is..... 43

— When surety to undertaking on arrest, guilty of..... 33

— Effect of appeal from judgment in action on which undertaking was given..... 43

— See SURROGATE.

CONTINUING ACTION—See ABATEMENT AND REVIVAL.

CONTRACT—When not adjudged illegal..... 263, 268

— Effect of doing business under fictitious name... .. 263, 268

— Judgment or statutory liability is not..... 79

CORPORATION—Power of court in proceedings for voluntary dissolution of..... 342

— Appointment of receiver, when may be made..... 342

	Page
— Contents of report of referee or decision of court in such proceedings...	342
— Determination of title of claimants of office of trustee of religious, cannot be made in equitable action brought by one claimant or set of claimants.....	406
— What is <i>prima facie</i> evidence of election of such trustees...	406
— See COUNTY COURTS; FORECLOSURE; INJUNCTION; RECEIVER; UNDERTAKING.	
COSTS —Liability for, created by section 3247 of the Code of Civil Procedure, is not contract	79
— Liability of attorney for.....	371
— See ALLOWANCE; EQUITY; JUSTICE OF THE PEACE; PLEADINGS; COMPLAINT; REFERENCE.	
COUNTERCLAIM —See ABATEMENT; PLEADINGS.	
COUNTY COURTS —Jurisdiction of, of actions against domestic corporations.....	348
— Objection to, how raised.....	348
— Waiver of	348
— Instance of case in which want of jurisdiction did not appear on face of complaint.....	348
COURT OF APPEAL —When will consider case upon cause of action disclosed by evidence rather than upon that set up in pleadings.....	1
— Reviewing facts on appeal to.....	425
COURT OF COMMON PLEAS —On appeal to, from N. Y. City Court from judgment directing new trial, appellant must consent to final judgment or court is without jurisdiction	191
— Where consent intentionally withheld, court cannot supply omission, <i>nunc pro tunc</i>	191
— Jurisdiction not conferred on appellate court by consent... ..	191
— Discretionary orders of N. Y. City Court not reviewable on appeal to.....	126
— Relation of, to N. Y. City Court.....	126
— See JUDGMENT.	
DEATH —Measure of damages in action for causing.....	353
— What is amount of recovery in action for causing.....	222
— See ABATEMENT AND REVIVAL; ALLOWANCE.	
DEMURRER —See APPEAL; PLEADINGS.	
DISCONTINUANCE OF ACTION —Power of attorney to consent to.....	315
— Effect of, on cause of action where, in terms, made on a settlement.....	315
— See APPEARANCE; PLEADINGS— <i>Complaint</i> .	
DISCOVERY —See INSPECTION.	

	Page
DISTRICT COURT IN CITY OF NEW YORK —Right of party to be heard by counsel on submission of case, cannot be denied by justice although he may limit time of oral argument	416
— See EXECUTION AGAINST THE PERSON .	
EJECTMENT —Damages on recovery of real property in.....	39
— What improvements may be set off.....	39
— What amounts to ouster.....	39
EQUITY —When has jurisdiction of action to set aside judgment	191
— Party liable for costs of action brought for his benefit, may move to set aside void judgment therein.	
— Determination of title of rival claimants of office of trustee of religious corporation cannot be made in equitable action brought by one claimant or set of claimants.....	406
ESCHEAT —See ALIENS .	
EVIDENCE —When testimony of personal transactions, etc. not excluded in action against administrator on the ground of interest of witness.....	71
— What evidence of interest necessary.....	71
— In Surrogate's Court such testimony must be objected to by executor, administrator or survivor of decedent.....	63
— Objection by creditor not sufficient.....	63
— Testimony as to transaction between a party and a deceased person through whom both parties claim, when should be excluded.....	235
— When letter may not be received in, on behalf of party who wrote it.....	425
— Burden of proof of consideration in action on undertaking on appeal defective in form	226
— Proof of value of professional services in an action by an attorney therefor where a sum in gross is claimed	294
— Admission on which new trial granted is evidence against party making it, on such new trial.....	173
— Proof of partial satisfaction of cause of action sounding in tort by one of two joint tort feassors admissible in mitigation of damages.....	135
EXAMINATION OF PARTY BEFORE TRIAL —In action to recover chattels, the sale of which is alleged to have been procured by fraud.....	152
— In such case there may be an examination of an assignee for benefit of creditors.....	152
EXECUTION —Time of sheriff to return, extended by stay of proceedings	173
— See SUPPLEMENTARY PROCEEDINGS .	
EXECUTION AGAINST THE PERSON —When may issue	

	Page
out of N. Y. District Court without proof on trial, of facts authorizing.....	184
EXECUTOR AND ADMINISTRATOR —Subrogation of claim of, for money paid to redeem real property from tax sale, in place of lien of taxes.....	62
— Power of Surrogate and of Supreme Court to open, vacate or set aside accounting of.....	15
— Effect of agreement between heirs on liability of	15
— See ABATEMENT; ACCOUNTING; CITY COURT OF NEW YORK; EVIDENCE; LACHES; SURROGATE.	
FICTITIOUS NAME —See CONTRACT.	
FINDINGS —How disposed of by court before which action tried.....	324
— Effect of failure to make, because deemed unnecessary....	324
FORECLOSURE —Questions which cannot be tried in action of.....	336, 363
— Parties to action of.....	336, 363
— Adverse claimants not proper parties to.....	336, 363
— Action for, of mortgage given to trustees to secure bonds by whom brought.....	90
FRAUD —What amounts to, in contracting liability.....	148
— Action for fraudulently obtaining signature to bond is for injury to property.....	121
— Special allegation of damage not necessary.....	121
GUARDIAN —See ACCOUNTING.	
GUARDIAN AD LITEM —Effect of failure to acknowledge consent to be.....	305
— See SURROGATE.	
HABEAS CORPUS —To secure custody of child, by whom issued.....	299
— Effect of failure to state in petition that person in whose behalf writ is issued is not detained by virtue of a final order of a competent tribunal, etc.	299
HEIR —See ALIENS.	
HUSBAND AND WIFE —Liability of husband for wife's torts.	135
— See PARTIES TO ACTION.	
INFANT —Place of residence of, how determined....	246
— See GUARDIAN AD LITEM; SUMMONS; SURROGATE.	
INJUNCTION —Order staying actions and proceedings when not void because too broad	106
— Power of court to restrain actions and interference with property when receiver has been appointed.....	106, 113
— Application of Code to such order.....	106

— Power of court to grant, restraining interference with acting trustees of religious corporations by rival claimant of office...	406
— When granted.....	406
— Effect of insufficient service of injunction order.....	166
— Motion to vacate order where made.....	106
— When vacated as to attaching creditors.....	113
— See EXECUTION.	
INSPECTION —When order for, of books granted.....	33
JOINDER OF ACTIONS —See ACTION; PLEADINGS— <i>Complaint</i> .	
JUDGMENT —Effect of satisfaction of.....	315
— The filing of remittitur and docketing in N. Y. city court of void judgment rendered in N. Y. court of common pleas does not give it new vitality.....	191
— See BANKRUPTCY; EQUITY; JUSTICE OF THE PEACE.	
JURISDICTION —See APPEAL; COUNTY COURT; COURT OF COMMON PLEAS; ORDER.	
JUSTICE OF THE PEACE —Provisional remedies in courts of.....	253
— Effect of error in replevin process on judgment.....	253
— Effect of error in costs and mode of correcting.....	253
— Testimony taken in court of, on adjourning case, will not sustain judgment unless read in evidence.....	28
— When offer to reduce verdict may be made.....	56
— Effect of such offer made after judgment.....	56
— Power of, to change record.....	56
— Right to costs on appeal.....	56
— Mode of service of notice of appeal from judgment of.....	333
— Curing defective service <i>nunc pro tunc</i>	333
— Action to recover chattel when commenced in court of....	253
LACHES —Effect of, on proceeding for accounting of executor, etc.	85
— See SECURITY FOR COSTS.	
LANDLORD AND TENANT —See SUMMARY PROCEEDINGS.	
LIMITATIONS TO ACTION —When coming into the State does not amount to a "return" thereto.....	307
— Application of statute of limitations to broker's contract...	1
— When proceedings for accounting in surrogate's court not barred by.....	85, 88
MARINE COURT —See CITY COURT OF NEW YORK.	
MARRIED WOMAN —See PARTIES TO ACTION.	
MORTGAGE —See FORECLOSURE.	
MOTION —Renewal of.....	178
— What amounts to new proof on.....	178
— Report of referee to take proof on, when should stand....	178

	Page
NAME —See CONTRACT .	
ORDER —Re-settlement of.....	74
— When properly made by court.....	74
— Void, may be disregarded	90
— Made by judge not having jurisdiction is absolutely void.	90
ORDER OF ARREST —See ARREST .	
ORDER TO SHOW CAUSE —Specifying irregularities in....	188
OUSTER —See EJECTMENT .	
PARTIES TO ACTION —Husband not proper party defendant	
in action against married woman for slander.....	51
— When all obligors in auctioneer's bond not necessary.....	238
— See ACTION ; FORECLOSURE .	
PERJURY —Is a contempt of court.....	43
— Instance of case in which an affiant was guilty of.....	43
PLEADINGS —Duty of court to give party benefit of cause of	
action established by evidence notwithstanding insufficiency	
of pleadings.....	1
— See COURT OF APPEALS .	
— <i>Complaint</i> . Cannot be amended on trial so as virtually to	
discontinue action as to a defendant without payment of costs.	336
— Effect of service of, after service of summons and before	
appearance of defendant.....	69
— Not necessary to aver malice or want of probable cause in	
action on undertaking given to procure warrant of attachment.	26
— Allegations which will not admit proof that attachment was	
void.....	26
— A cause of action for obtaining the execution of a bond by	
false representation, may be joined with one for conversion,	
both being for an injury to property.....	121
— Not necessary to allege special damages in action for ob-	
taining the execution and delivery of a bond by false repre-	
sentations.....	121
— Allegations of fraudulent intent implies that defendant	
knew representations to be false.....	121
— Prior to amendment of Code in 1879 not necessary to plead	
fraud in contracting liability.....	148
— Instance of an action to set aside conveyance and agreement	
to re-convey on the ground that they are an usurious mortgage.	286
— See ACTION ; APPEAL ; FRAUD .	
— <i>Answer</i> . Former recovery, when to be pleaded.....	39
— Denial in, may be on information and belief.....	54
— When verification of, may be omitted.....	30
— Stay of proceedings not extension of time to answer.....	188
— <i>Counterclaim</i> . When sufficient.....	286

	Page
— For rent in action to declare deed mortgage and for accounting of rent when proper.....	286
— See CITY COURT OF NEW YORK.	
— <i>Verification</i> . Taken out of state without certificate required in such cases pleading to be regarded as unverified....	117
PRINCIPAL AND AGENT —Effect of concealment by agent of name of principal.....	1
— Rights and liabilities of broker who conceals name of principal.....	1
— See LIMITATIONS TO ACTION.	
PROCEEDINGS SUPPLEMENTARY TO EXECUTION —	
See SUPPLEMENTARY PROCEEDINGS.	
PROVISIONAL REMEDIES —When one of two granted in same action to be vacated.....	368
RAILROAD --See APPEAL; CORPORATION.	
REAL PROPERTY —See ALIENS; EJECTMENT.	
RECEIVER —Motion for appointment of, of corporation to be made in county in or adjoining which principal office is.....	90
— Power of supreme court to appoint, of foreign corporation.....	106, 113
— Notice to attorney-general not necessary.....	113
— Motion for appointment of, where made.....	106
— Motion to vacate order appointing, where made.....	106
— Who appointed in case of prior appointment by void order.	90
— See CORPORATION; SUPPLEMENTARY PROCEEDINGS.	
REFEREE —See REFERENCE.	
REFERENCE —When compulsory, will not be ordered in action by attorney for professional services.....	294
— Report of referee on motion.....	315
— Taxation of costs of such reference.....	315
— What amounts to sufficient delivery of report of referee to entitle him to his fees and prevent reference being closed....	418
— See MOTION.	
RELIGIOUS CORPORATIONS —See CORPORATIONS; INJUNCTION.	
REPLEVIN —See JUSTICE OF THE PEACE.	
RES ADJUDICATA —See PLEADINGS, <i>Answer</i> ; SUMMARY PROCEEDINGS.	
RESIDENCE —What presence in State does not constitute....	371
— See INFANT.	
REVIVAL —See ABATEMENT AND REVIVAL.	
SECURITY FOR COST —When ordered on ground of non-residence.....	156
— Laches.....	156

	Page
— Attorney when liable for costs because, not given.....	294
— See COSTS.	
SERVICE —See AFFIDAVIT; PLEADINGS, <i>Complaint</i> ; SUMMONS.	
SERVICE BY PUBLICATION —See AFFIDAVIT; SUMMONS.	
SHERIFF —Substitution of indemnitors for, in action against, for wrongfully taking, etc., personal property, when properly ordered.....	377
— Liability of indemnitors.....	377
— Waiver of objection that bond was not given until after commencement of action.....	377
— See BILL OF PARTICULARS; EXECUTION.	
SLANDER —See PARTIES TO ACTION.	
STATUTE —In construing, judge vested with authority to disregard the letter in order, in a given case, to attain the ends of justice.....	307
STAY OF PROCEEDINGS —See BILL OF PARTICULARS; EXECUTION; PLEADINGS, <i>Answer</i> .	
SUBROGATION —See ABATEMENT AND REVIVAL.	
SUMMARY PROCEEDINGS —Tenant cannot deny landlord's title in.....	286
— When adjudication as to, in such proceeding not <i>res adjudicata</i>	286
SUMMONS —When substituted service of, ordered.....	366
— Time to answer when, so served.....	366
— Proof on entry of judgment on.....	366
— Provisions of code relating to service of, by publication equally applicable to infant as to an adult.....	216
— Infant when estopped from denying regularity of such service.....	261
SUPPLEMENTARY PROCEEDINGS —Mode of compelling production of books on examination in.....	360, 362
— Corporation may be compelled to produce books, etc.....	362
— Examination in, where debtor has made assignment for benefit of creditors not confined to property acquired subsequent to assignment.....	232
— Order appointing receiver in, in place of one who has resigned, properly made by court and not by judge.....	74
— Notice of application for receiver in, when necessary.....	36
— Receiver may be appointed in, either before or after return of execution and on examination of third party.....	394
— NOTE ON APPOINTMENT OF RECEIVER IN SUPPLEMENTARY PROCEEDINGS.....	396
— When and by whom appointed, 396; notice of application, 397; extending former receivership, 398; filing order, 399;	

	Page
security, 399; removing receiver, 400; effect of appointment on proceedings, 401.	
SURROGATE —Jurisdiction of, to determine rights of legatees	245
— Effect of irregular service of citations in surrogates court..	15
— Appointment of guardian <i>ad litem</i>	15
— When decree made on accountings of executor, trustee and guardian will not be opened.	389
— Power of, to open decrees and grant new hearing.	389
— Power of, to punish for contempt.	250
— See EVIDENCE; EXECUTOR AND ADMINISTRATOR.	
TORT —Effect of partial satisfaction by one of two joint tortfeasors	135
— See HUSBAND AND WIFE; PARTIES TO ACTION.	
TRIAL —What amounts to waiver of notice of	82
— Who may move case for.	82
— Verdict of jury on specific questions of fact in action triable by court.	425
— Power of court to disregard.	425
UNDERTAKING —Form of, on appeal when guaranteed by corporation authorized to guarantee undertakings.	259, 386
— When guaranteed by corporation, must be executed by party.	169
— Justification of corporation guaranteeing, and approval.	169, 171, 386
— Although defective in form, it may be supported as against the sureties by any sufficient consideration.	226
— Form of, to replevy chattels in action in justice's court.	253
— When reversal of judgment as to one of three defendants amounts to breach of condition of, on appeal.	226
— Effect on undertaking on arrest of appeal from judgment in action in which it was given.	43
— See CONTEMPT; EVIDENCE; PLEADINGS, <i>Complaint</i> .	
USURY —See PLEADINGS, <i>Complaint</i> .	
VERDICT —See TRIAL.	
VERIFICATION —See PLEADINGS.	
WILL —When aliens should be cited to attend probate of.	326
— When admitted to probate against testimony of subscribing witness.	128
WITNESS —See EXAMINATION OF PARTY BEFORE TRIAL.	

TABLE OF CASES

REPORTED IN VOLUMES 1 TO 6 OF THESE REPORTS
WHICH HAVE BEEN

AFFIRMED, REVERSED, MODIFIED, ETC.

	Reported N. Y. Civ. Pro. R. Vol.	Page
BAILEY, <i>In re</i>	4	140
Order affirmed with \$10 costs, and disbursements (Sup. Ct., 1 Dep't., Gen'l T., Jany. 1884), 5 <i>N. Y.</i> <i>Civ. Pro.</i> 253.		
BARNARD v. ONDERDONK	2	294
Judgment affirmed with costs by court of appeals Feby. 10, 1885.		
BENGTSON v. THINGVALLA STEAMSHIP Co	3	263
Judgment affirmed with costs (Sup. Ct., 2 Dep't., Gen'l T., Sept. 1883), 4 <i>N. Y. Civ. Pro.</i> 260.		
BOGERT, ESTATE OF	4	441
Decree of surrogate affirmed with costs to appellant (Sup. Ct., 2 Dep't., Gen'l T., Sept. 1884), 6 <i>N. Y.</i> <i>Civ. Pro.</i> 128.		
BOWE v. CAMPBELL	2	232
Judgment affirmed on opinion of VAN VORST, J., and on authority of <i>Flack v. State of New York</i> , 29 <i>Hun</i> , 286 (Sup. Ct., 1 Dep't., Gen'l T., March 1884), 32 <i>Hun</i> , 243.		
BOYD v. SMITH	3	347
Order affirmed with costs (Ct. App. June 1883), 3 <i>N. Y. Civ. Pro.</i> 416.		
BUCKLEY v. GUTTA PERCHA & RUBBER MAN'F'G Co.	3	428
Appeal dismissed; no opinion (Ct. App. June 1883), 93 <i>N. Y.</i> 637.		
CLARK v. DILLON	4	245
Judgment affirmed with costs by court of appeals Nov. 25, 1884.		

CASES AFFIRMED, ETC.

457

	Reported N. Y. Civ. Pro. R. Vol.	Page
COMBS v. COMBS	1	298
Order reversed, with costs (Sup. Ct., 4 Dep't., Gen'l T. 1881), 25 <i>Hun</i> , 279.		
CONCORD GRANITE Co. v. FRENCH	3	56
Judgment affirmed with costs and disbursements (N. Y. Com. Pleas, Gen'l T., May 1883), 3 <i>N. Y.</i> <i>Civ. Pro.</i> 445.		
COOPER v. JOLLY	3	9
Order reversed (Sup. Ct., 4 Dep't., Gen'l T., 1883), 30 <i>Hun</i> , 224. Order of general term reversing order of special term affirmed, without opinion (Ct. App. June 1884), 96 <i>N. Y.</i> 667.		
CROSSMAN, <i>In re</i>	3	65
Decree of surrogate affirmed with costs, <i>sub nom.</i> Crossman v. Crossman (Sup. Ct. 2 Dep't., Gen'l T. 1883), 30 <i>Hun</i> , 385. Order of general term affirming surrogate's decree, affirmed <i>sub nom.</i> Crossman v. Crossman (Ct. App. Feb'y, 1884); 5 <i>N. Y. Civ. Pro.</i> 204.		
DICKENSON v. THE MAYOR.	3	98
Judgment affirmed (Ct. App. June 1883), 92 <i>N. Y.</i> 584.		
ERKENBRACH v. ERKENBRACH.	5	184
Order of general term affirmed (Ct. App. Oct. 1884), 96 <i>N. Y.</i> 456.		
FIRST NAT'L BANK OF OSWEGO v. DUNN.	4	378
Order of general term reversing order of special term, granting motion, reversed, and order of special term affirmed (Ct. App. Oct. 1884), 20 <i>N. Y.</i> <i>Weekly Dig.</i> 17.		
FITZGERALD v. QUANN.	1	273
Judgment and order reversed (Sup. Ct. 5 Dep't., Gen'l T. Oct. 1884), 33 <i>Hun</i> , 652.		
GATES v. CANFIELD.	2	254
Order reversed (Sup. Ct. 4 Dep't., Gen'l T. 1883), 28 <i>Hun</i> , 12.		
GROSS v. CLARK.	1	17
Order affirmed with costs (Ct. App., Dec. 1881), 1 <i>N. Y. Civ. Pro.</i> 464.		
HALL v. U. S. REFLECTOR Co.	4	148
Order reversed with \$10 costs and disbursements, (Sup. Ct., 1 Dep't, Gen'l T.; Jan. 1884), 31 <i>Hun</i> , 609. Order of general term affirmed without opinion (Ct. App. May 6, 1884), 96 <i>N. Y.</i> 629.		

	Reported	
	N. Y. Civ. Pro. R.	Page.
Vol.		
HAYES v. DAVIDSON.	6	377
Orders of general and special terms reversed and motion denied with costs in all the courts (Ct. App., Jan'y 20, 1885), to be reported, 7 <i>N. Y. Civ. Pro.</i>		
HEIN v. DAVIDSON.	5	28
Order of general term reversed and order of special term affirmed with costs (Ct. App. June, 1884), 5 <i>N. Y. Civ. Pro.</i> 391.		
HIGGINS v. CHRICHTON	2	317
Judgment affirmed with cost, by Court of Appeal, Jany. 20, 1885.		
HOLSMAN v. ST. JOHN	2	48
Order of general term affirming order of special term reversed (Ct. App. 1882), 90 <i>N. Y.</i> 461.		
HUGHES v. HUGHES	2	139
Judgment affirmed, with costs (Sup. Ct. 1 Dept. 1883), 30 <i>Hun</i> , 349.		
JAMES v. SHEA	2	358
Judgment and order affirmed with costs, by Court of Appeals, Jany. 20, 1885.		
LITTLE v. LYNCH	5	216
Order reversed with costs and disbursements and order granted denying motion (Sup. Ct. 1 Dept. Gen'l T. Jany. 1885), 6 <i>N. Y. Civ. Pro.</i> 418.		
McNULTY v. SCOLLEY	4	250
Order affirmed (Ct. App. March, 1884), 95 <i>N. Y.</i> 243.		
MANNING v. GOULD	1	216
Judgments of general and special terms reversed and new trial ordered; costs to abide the event (Ct. App. Oct. 1882), 3 <i>N. Y. Civ. Pro.</i> 58.		
MARKET NAT'L BANK OF NEW YORK v. PACIFIC NAT'L BANK OF BOSTON	2	330
Order reversed, with costs (Sup. Ct. 1 Dept. Gen'l T. 1883), 30 <i>Hun</i> , 50. Order of general term reversing order of special term affirmed on opinion in <i>Raynor v. Pacific Nat'l Bank</i> , 93 <i>N. Y.</i> 371 (Ct. App. Oct. 1883), 93 <i>N. Y.</i> 648.		
MARTIN v. RECTOR	2	134
Order reversed (Sup. Ct. 3 Dep't, Gen'l T. 1883), 28 <i>Hun</i> , 409.		
METROPOLITAN CONCERT CO. v. ABBEY	5	26

	Reported N. Y. Civ. Pro. R. Vol. Page	
Appeal to court of appeals dismissed, without opinion (Ct. App. Oct. 1883), 93 <i>N. Y.</i> 634.		
MURTHA v. CURLEY.	3	86
Order of general term reversed and order of special term affirmed (Ct. App. May, 1883), 3 <i>N. Y. Civ. Pro.</i> 266.		
ORDEN GERMANIA v. DEVENDER.	6	161
Appeal to court of appeals dismissed October 31, 1884.		
ORSER, ESTATE OF.	4	129
Decree of surrogate affirmed, with costs, against the appellant (Sup. Ct., 2 Dep't, Gen'l T. Dec. 1883) <i>sub nom.</i> Matter of Brown, 31 <i>Hun</i> , 166.		
PEOPLE <i>ex rel</i> NEGUS v. DWYER.	1	484
Order affirmed (Sup. Ct., 2 Dep't, Gen'l T., 1883), 27 <i>Hun</i> , 548. Order of general term affirming order of special term, affirmed with costs (Ct. App. Nov. 1882), 2 <i>N. Y. Civ. Pro.</i> 379.		
PEOPLE v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.	2	89
PEOPLE v. N. Y. LAKE ERIE & WESTERN R. R. Co.	2	82
Order reversed with costs and motion granted (Sup. Ct., 1 Dep't, Gen'l T.; Jan'y 1883), 3 <i>N. Y. Civ. Pro.</i> 11.		
PHELPS v. PHELPS.	6	117
Order affirmed (Sup. Ct., 3 Dep't, Gen'l T. May 1884), 32 <i>Hun</i> , 642.		
PLIMPTON v. BIGELOW.	3	189
Order of general term reversing order of special term reversed and order of special term affirmed (Ct. App. Nov. 1883), 93 <i>N. Y.</i> 592.		
PUTNAM v. STEWART.	2	172
Jndgment affirmed with costs by Court of Appeals, November 25, 1884.		
RAMSDEN v. RAMSDEN	2	416
Order affirmed without costs (Ct. App. Jan'y. 1883), 91 <i>N. Y.</i> 281.		
REMINGTON PAPER CO. v. O'DOUGHERTY	6	79
Affirmed, without opinion (Ct. App. June 1884), 96 <i>N. Y.</i> 666.		
ROCKWELL v. DECKER	5	62
Order affirmed with costs and disbursements (Sup. Ct., 2 Dep't., Gen'l T., Sept. 1884), 33 <i>Hun</i> , 343.		
ROSS v. WIGG (<i>note</i>)	6	268
Order affirmed with costs and disbursements		

		Reported N. Y. Civ. Pro. R. Vol. Page
(Sup. Ct., 4 Dep't, Gen'l T., June 1884), 6 <i>N. Y. Civ. Pro.</i> 263.		
SECOND NAT'L BANK OF OSWEGO <i>v.</i> DUNN	4	378
See First Nat'l Bank of Oswego <i>v.</i> Dunn, <i>supra</i> .		
SHERWOOD <i>v.</i> TRAVELERS' INS. CO.	2	67
Order reversed with costs and disbursements (N. Y. Com. Pleas, Gen'l T., March 1883), 3 <i>N. Y. Civ. Pro.</i> 281.		
SNYDER <i>v.</i> SNYDER	4	370
Order affirmed with costs and disbursements (Ct. App. May, 1884), 5 <i>N. Y. Civ. Pro.</i> 267.		
THOMAS <i>v.</i> UTICA & BLACK RIVER R. R. Co.	6	353
Order affirmed by general term of supreme court 4th department, October 1884.		
TIM <i>v.</i> SMITH	3	347
Order affirmed with costs (Ct. App. June, 1883), 3 <i>N. Y. Civ. Pro.</i> 416.		
TOMPKINS <i>v.</i> SMITH	1	398
Order affirmed (N. Y. Super. Ct. Genl. T. 1882), 48 <i>N. Y. Super. (J. & S.)</i> 113; S. C., 64 <i>How. Pr.</i> 499. Order of general term affirmed without opinion (Ct. App. 1883), 89 <i>N. Y.</i> 602.		
TROW PRINTING, ETC. CO. <i>v.</i> HART	1	240
Order affirmed (Ct. App. 1882), 85 <i>N. Y.</i> 500.		
WALLACE <i>v.</i> FEELY	1	126
Affirmed without opinion (Ct. App. 1882), 88 <i>N. Y.</i> 646.		
WILLIAMS <i>v.</i> WESTERN UNION TELEGRAPH CO.	1	84
Order affirmed with costs (N. Y. Super. Ct. Genl. T. May, 1881), 1 <i>N. Y. Civ. Pro.</i> 294.		
WHITE <i>v.</i> RINTOUL	6	259
Order affirmed with costs and disbursements by general term of N. Y. Superior Court, December 1, 1884.		
WOERISHOFFER <i>v.</i> NORTH RIVER CONSTRUCTION CO.	6	113
Order affirmed with \$10 costs and disbursements by general term of Supreme Court first department, January 8, 1885.		









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